

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re:) Docket No. 03-2009-A-0944
)
 [APPELLANT'S NAME]) **REVIEW DECISION AND FINAL ORDER**
)
 Appellant) Developmental Disabilities

I. NATURE OF ACTION

1. Administrative Law Judge Monty Futch held an administrative hearing on July 23, 2009, and mailed an Initial Order on January 4, 2010. In this decision, the Administrative Law Judge (ALJ) concluded that [APPELLANT'S NAME] (the Appellant) was not eligible for Department of Social and Health Services (Department) Division of Developmental Disabilities (DDD) services, and that DDD appropriately terminated his services.

2. On January 25, 2010, the Appellant filed a Petition for Review of the Initial Decision. This Petition for Review of the Initial Decision stated:

I. Introduction

Appellant [APPELLANT'S NAME] hereby requests that the Department of Social and Health Services ("DSHS," "the Department") Board of Appeals ("BOA") review the attached Initial Order upholding the Department's Division of Developmental Disabilities ("DDD") termination of his eligibility. [APPELLANT'S NAME] is requesting that the BOA: (1) modify the Administrative Law Judge's ("ALJ's") Findings of Fact that are contrary to the exhibits and testimony in the record; (2) conclude that there was not substantial evidence from the record as a whole to support the Department's termination of his eligibility for DDD services; and (3) correct the ALJ's erroneous interpretation of the specific department regulations governing DDD eligibility based on "autism." See WAC 388-020-0420.

The Board of Appeals should conclude that there was not substantial evidence to support the ALJ's conclusion that [APPELLANT'S NAME] is ineligible for DDD services, and that the ALJ erred as a matter of law in sustaining the Department's termination of his eligibility. The BOA should issue a Review Decision and Final Order that reverses the Department's termination of [APPELLANT'S NAME] eligibility.

II. Standard of Review

A DSHS review judge acts as the final Department decision-maker. RCW 34.05.464(2); WAC 388-02-0600(3). In a DDD termination case, the review judge may reverse the hearing decision for a number of reasons, including that the findings of fact are not supported by substantial evidence based on the entire record. Substantial evidence is a “sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *Pitts v. Department of Social and Health Services*, 129 Wn. App. 513, 119 P.3d 986 (Div.2 2005), citing *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004). In addition, the review judge may reverse or amend the initial order where the decision includes errors of law, or where findings of fact must be added because the ALJ failed to make an essential factual finding. WAC 388-02-0600(2). Additional findings “must be supported by substantial evidence in view of the entire record and must be consistent with the ALJ’s findings that are supported by substantial evidence based on the entire record.” WAC 388-02-0600(2)(e).

III. Errors of Law

a. The ALJ’s conclusion that Appellant’s VABS (“Vineland”)¹ results cannot be accepted by DDD because DDD has determined that the Appellant has an unrelated illness which impairs his current adaptive functioning is an error of law and should be reversed by the BOA.

The Department’s hearing rules require an ALJ to apply the Department’s regulations as the first source of law. WAC 388-02-0220. The Washington Administrative Procedure Acts provides that: “Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefore, on all the material issues of fact, law, or discretion presented on the record . . .” RCW 34.05.461(3). In Conclusion of Law No. 4, the ALJ correctly recites and emphasizes the language in WAC 388-823-0240 (2):

If DDD is unable to determine that your current adaptive functioning impairment is the *result* of your developmental disability because you have an unrelated injury or illness that is impairing your current adaptive functioning:

(a) DDD will not accept the results of a VABS or SIB-R administered after the event and will not administer the ICAP. . . [Emphasis added]

However, In Conclusion of law No. 5, citing the above WAC provision, the ALJ states:

¹ WAC 388-823-0420 states that the evidence of substantial limitations of adaptive functioning for autism requires a qualifying score completed in the past thirty-six months in a Vineland Adaptive Scales Assessment (VABS) or a Scales of Independent Behavior-Revised (SIB-R), or a qualifying score completed in the past twenty-four months in an Inventory for Client and Agency Planning (ICAP); See *also*, Appellant’s Closing Brief, at 13-16. Here, [DOCTOR 1] conducted the Vineland assessment on the Appellant.

“DDD has, and in the view of the Tribunal, correctly so, determined that the Appellant has an unrelated illness which impairs both his current adaptive functioning and his adaptive functioning as it existed in 2005 and early 2006. Accordingly, [DOCTOR 1]’s Vineland results cannot be considered, much less accepted by DDD.”

The ALJ offered no reasoning or analysis on the issue of whether the Department was able to determine if the Appellant’s impairment in his adaptive functioning is the *result* of his developmental disability or an unrelated injury or illness as required by the plain language of the WAC. Instead, the ALJ accepts, at face value, the Department’s view and practice that merely *having* an unrelated illness is an automatic disqualification from eligibility for DDD services without regard to whether the functional impairments *result* from a developmental disability or the unrelated illness, as required by WAC 388-823-0420(2).

The ALJ also appears to have adopted the Department’s erroneous interpretation of WAC 388-823-0430(2) that a dually diagnosed individual must be “cured” of a non-qualifying mental illness in order to be eligible for DDD services. In her testimony at the hearing in this case, DDD regional staff person Kay Stotesbery² claimed that the Appellant’s diagnosed mental illness completely and absolutely prevents her from assessing the evidence in the record of his impaired adaptive functioning: “he had coexisting conditions of such severity that there would be no way to get an accurate Vineland.” Testimony of Kay Stotesbery. Ms. Stotesbery further acknowledged that while there have been periods when the Appellant was doing fairly well, “doing fairly well is not the same thing as being *cured*, and if you’re not *cured*, you still have it.” [Emphasis added]. In her testimony Stotesbery stated that she did not discover any documents that indicated his mental illness was in remission or that he was no longer diagnosed with it:

No, if you have that diagnosis, you have to be experiencing the symptoms, he has carried the diagnosis, carries the diagnosis, which means he’s having the symptoms, . . . uhm, and he’s in a mental hospital. If he was *cured* of mental illness, they would hardly keep him. Uhm, you know, they can’t keep him if he’s if he’s *cured* and doing fine, but he, but he wasn’t . . . there’s nothing that says he’s ok, that he has overcome mental illness or been *cured* from mental illness, no reports say that. Testimony of Kay Stotesbery [Emphasis added].

Ultimately, Ms. Stotesbery expressed some discomfort with how she believed she was expected to enforce the eligibility regulations. When Appellant’s counsel asked Ms. Stotesbery how is someone who is dually diagnosed with a developmental disability and mental illness is supposed to establish eligibility, she responded:

² Kay Stotesbery is the regional DDD staff person who initially reviewed [APPELLANT’S NAME]’s eligibility in 2006, and who did so again in 2008 after the Department’s termination of [APPELLANT’S NAME]’s DDD eligibility based on her first review was reversed by the Superior Court. Testimony of Kay Stotesbery.

That's an interesting question, sir . . . uhm, the WAC was rewritten in 2005, there are those of us who feel there are some significant improvements that could be made, but we're not permitted to make them until the stimulus money is . . . something or other . . . uhm, it makes it difficult for those people who have become mentally ill to stay clients in a circumstance such as this.
Testimony of Kay Stotesbery.

Linda Lundsford, the Department's statewide Program Manager for DDD eligibility, provided further testimony at hearing regarding DDD's process in making an eligibility determination. When Appellant's counsel asked how it would be possible under the Department's approach for someone who is dually diagnosed to establish eligibility for DDD services under WAC 388-823-0420, Ms. Lundsford responded:

It's very difficult. If, Uhm, we have, uhm, significant uhm, evidence of impairment, qualifying impairment, prior to the onset of a mental illness, it's uhm, possible that we would be able to consider that evidence in determining eligibility. But generally, uhm, it's, it's very difficult.

As to what type of evidence is considered by the Division, Ms. Lundsford stated that eligibility "decisions are based solely on documentation." When asked about whether the Department would accept a qualifying VABS score if a person who was dually diagnosed with a developmental disability and a mental illness received successful treatment for the mental illness, Ms. Lundsford responded:

Only if, I believe only if, uhm, the applicant was considered *cured* of the mental illness, and that they were no longer uhm, experiencing effects of the mental illness. [Emphasis added].

However, Ms. Lundsford admitted that such a "cured" standard or interpretation exists nowhere in written DDD policy, nor anywhere in the Department's regulations. Testimony of Linda Lundsford.

The Appellant presented substantial evidence on the record as a whole that his other illnesses were not interfering with his adaptive functioning at the time the Vineland assessment was conducted, and that it was therefore possible to distinguish between impairment resulting from autism and impairment resulting from other illnesses. See evidence discussed in Appellant's Closing Brief, at 13 – 16, 18 – 20.

The ALJ violated the Administrative Act by not addressing the Appellant's argument regarding the substantial evidence that Appellant's other illness was not interfering with his adaptive functioning at the time that the Vineland was conducted. Moreover, the ALJ's erroneous interpretation and application of WAC 388-823-0420 is also a clear error of law and must be reversed by the BOA.

b. The ALJ's adoption of the Department's erroneous interpretation of its regulation reaches an absurd and illegal result in that it artificially creates more stringent eligibility criteria than are stated in the rule itself.

By interpreting its rules to require that a dually diagnosed applicant for DDD services be "cured"³ of the non-qualifying illness, the Department has illegally engaged in rulemaking. If an agency takes action meeting the definition of a "rule" but fails to employ the requisite rulemaking processes, the agency action may be invalidated. *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 835 P.2d 1030 (1992); *State v. Kerry*, 34 Wn. App. 674, 663 P.2d 500 (1983). The Administrative Procedure Act partly defines "Rule" as any agency order, directive, or regulation of general applicability.

- (a) the violation of which subjects a person to a penalty or administrative sanction;
- (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings;
- (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law;
- (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or
- (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale.

RCW 34.05.010(16).

An interpretive rule is a rule that sets forth the agency's interpretation of statutory provisions it administers. Such rules are intended to guide the general public which needs to know how an agency is applying its laws, especially if those laws are ambiguous. *Washington Administrative Law Practice Manual*, (2006) at 7 – 9.⁴ Frank E. Cooper, *State Administrative Law* (1965) at 173 – 174. Here, the Department has unlawfully engaged in rule-making, as it bypassed the formal rule-making process to develop and apply unwritten internal policies interpreting statutory provisions. In this case, the Department has required that the Appellant be "cured" of his mental illness as a condition of eligibility. As Linda Lundsford, the DDD Eligibility and Rules Coordinator, acknowledged in her testimony, such a condition is not stated in either DDD's authorizing statute, nor in DDD regulations or written agency policy.

³ See testimony of regional DDD staff person Kay Stotesbery and testimony of Linda Lundsford, the Department's statewide program manager for DDD eligibility; See also, Appellant's Closing Brief, at 8 – 11.

⁴ *Washington Administrative Law Practice Manual*, Matthew Bender & Company, Release No. 16, December 2006.

The BOA should add necessary findings of fact that are missing from the Initial Order on this issue. The BOA should make explicit findings of fact regarding the Department's illegal rulemaking, and the BOA should conclude that the Department illegally engaged in rulemaking when it required that a dually diagnosed applicant for DDD services be "cured" of the non-qualifying illness as a condition of eligibility.

i. Policy and Interpretive Statements

The APA does allow agencies to interpret laws or rules outside of the formal rulemaking process, as provided in RCW 34.05.230(1):

[A]n agency is encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only. An agency is encouraged to convert long-standing interpretive and policy statements into rules.

The statute defines interpretive statement to mean "a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, as to the meaning of a statute or other provision of law, of a court decision, or of an agency order." RCW 34.05.010(8). *Washington Educ. Ass'n v. Public Disclosure Comm'n*, 150 Wn.2d 612, 80 P.3d 608 (2003). State agencies are required to publish ". . . statements of general policy or interpretations of general applicability . . ." RCW 42.17.250(1).

The statutory definition of a policy statement is "a written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implement a statute or other provision of law, of a court decision, or of an agency order, including where appropriate, the agency's current practice, procedure, or method of action based on that approach." RCW 34.05.010(15).

Interpretive and policy statements are "advisory only," and are therefore not binding on the public. RCW 34.05.230(8). Indeed, "a person cannot violate an interpretive statement, and conduct contrary to an agency's written opinion does not subject a person to penalty or administrative sanction." *Washington Educ. Ass'n v. Public Disclosure Comm'n*, 150 Wn.2d 612, 80 P.3d 608 (2003).

Here, the Department has created the additional eligibility requirement that an applicant for DDD be "cured" of a mental illness. There is no evidence that any of DDD's policy statements or statutory interpretations applied in this case have been published as required by law. Because the Department has relied on such unpublished interpretive rules, [APPELLANT'S NAME] cannot lawfully be subject to termination of his DDD eligibility, based on the Department's claimed interpretation of its own rules. The BOA should reject the Department's interpretation of WAC 388-823-0420 as applied to [APPELLANT'S NAME] in this case.

ii. *Violation of Federal Medicaid Law*

By requiring that [APPELLANT'S NAME] be “cured” of his mental illness as a condition of DDD eligibility, the Department may have precluded any opportunity he may have had for placement in an intermediate care facility for the mentally retarded (ICF/MR) or for a Home and Community Based Services (HCBS) waiver under the federal Medicaid Act, and the Department has violated federal law in the process. This argument was presented in greater detail in the Appellant’s Closing Brief, pages 20 – 24, and is repeated here for purposes of preserving the issue for possible judicial review.

c. The Department’s Contention that [APPELLANT’S NAME] is Ineligible for DDD Services Simply Because the Appellant is Diagnosed With Mental Illness is Arbitrary and Capricious.

An agency action is arbitrary and capricious if it is “willful and unreasoning and taken without regard to the attending facts or circumstances.” See *Washington Independent Telephone Ass’n v. Washington Utilities and Transp. Comm’n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003).

Here, the Department refused to accept a qualifying VABS score, primarily on the grounds that [APPELLANT’S NAME] has an unrelated mental illness and has not been “cured” of it. The Department has no legal authority to arbitrarily add eligibility criteria to the existing regulations. By adopting the Department’s position in the Initial Order, the ALJ committed an error of law. The BOA should reverse the ALJ’s conclusion and conclude that the Department’s interpretation of WAC 388-823-0420 is arbitrary and capricious.

As applied in [APPELLANT’S NAME]’s case, regardless of any other conditions, or diseases, or disabilities he may have, [he] is eligible for DDD services under a fair interpretation of the agency’s rules implementing the clear statutory directive that DDD services be provided to individuals who suffer from “autism.” It is unrefuted that [APPELLANT’S NAME] has autism. There is clearly substantial evidence in the record in this case that [APPELLANT’S NAME] has substantial limitations in his adaptive functioning that are attributable to his autism and not an unrelated illness or injury. It is only the Department’s strained and unreasonable interpretation of its eligibility rule, WAC 388-823-0420, that prevents a determination that [APPELLANT’S NAME] is DDD eligible. The BOA should correct the ALJ’s interpretation and reverse the Department’s termination of [APPELLANT’S NAME]’s DDD eligibility.

IV. Additional Necessary Findings of Fact

Additional findings of fact are necessary in this matter because the Washington Administrative Procedure Act requires that “initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified.” RCW 34.05.461(3).

The ALJ either did not address, or did not adequately address, evidence presented by the Appellant on material issues of fact. As a result, the ALJ violated the Administrative Procedure Act and the BOA should add the findings of fact described below that are evident from the record in this matter, and that are necessary to reaching a correct legal conclusion.

a. Under a Fair Reading of the WAC, There is Substantial Evidence On the Record as a Whole Supporting [DOCTOR 1]'s Conclusion That [APPELLANT'S NAME]'s Other Illnesses Were Not Interfering With His Adaptive Functioning.

There is substantial evidence on the record as a whole that [APPELLANT'S NAME]'s other illnesses were not interfering with his adaptive functioning during the time the VABS assessment was conducted, and for several months before and after. As [NAME 1] testified, [APPELLANT'S NAME] had a long period of stability from his mental illness. The symptoms of the Appellant's mental illness had receded to the point where only his autistic symptoms had been evident. This assertion is supported by both the testimony of [NAME 1], and by the [FACILITY 1] records contained in Exhibits 19 and 38.

As a licensed psychotherapist, [NAME 1] has experience in working with people diagnosed with both autism and bipolar disorder. In his testimony, he described the effects and symptoms of autism and autism combined with bipolar disorder (as he has observed in his practice) and applied them to his [RELATIVE]'s case. According to [NAME 1], when he works with people whom he suspects are on the autistic spectrum, he looks for things such as:

Their ability to volley conversation back and forth, their statements of uh . . . their ability to understand their own emotional lines appropriate to age, which autistic people typically cannot do, uhm, their ability to understand uh, the unwritten rules of the system, you know, why for example a 16-year old boy shouldn't touch the hair of a 16-year old girl standing in front of him in the school line. Testimony of [NAME 1].

Whereas, with a combination of combined with Bipolar Disorder:

The bipolar disorder is going to present itself, well, people with bipolar disorder tend to be . . . as a symptom . . . the syndrome itself tends to present itself either as activated or withdrawn, uh, and so if it's withdrawn, that kid is going to uh, not be seeing me probably, that kid is, if their bipolar is on board, his parents are going to have a very difficult time getting him out of his room at home, the shades are going to be drawn, the heat's going to be up, he's going to have very peculiar routines, he's going to be dirty, he's going to be aversive to all stimuli. That's withdrawn type of bipolar disorder and autism. The activated type, uh, as would present with my [RELATIVE], there's going to be a lot of aggression, there's going to be inability to understand the context of situations, uhm, inability to differentiate friend from foe . . . uhm, in my case uh, dealing with, uh a kid that's challenged by autism

and bipolar disorder, my biggest charge is just keeping him in the room talking to me because he's going to suspect me, he's going to uhm, he's going to have, you know, very high cognitive production, his mind is going to going a mile as going minute. There may be . . . in the activated form, there may be uh, a mild paranoia, there kinds of things . . . all this kind of stuff I see with my own [RELATIVE]. Testimony of [NAME 1].

[NAME 1] further testified that his [RELATIVE] [APPELLANT'S NAME] initially had much difficulty when entering [FACILITY 1]. He described an altercation in February 2007, that took place between [APPELLANT'S NAME], hospital staff, and other patients. However, when he was put on the appropriate medication, and became medication compliant, [APPELLANT'S NAME] stopped hallucinating, stopped calling the FBI and CIA, and he was able to be on the [FACILITY 1] grounds with his friends. This improvement in his functioning and behavior lasted for a several month stretch of time in 2008, between the months of April and October. [NAME 1] testified that he was "able to have social life with him," which continued for quite some time. According to [NAME 1], the Appellant was "restored cognitively," while the "bipolar related psychotic stuff dropped off greatly," his "manner softened," and he was able to have many authorized leaves from [FACILITY 1] during that time. Again, this testimony is largely supported by the [FACILITY 1] records in Exhibits 19 and 38 (for the period of April through October 2008).

The Appellant's bipolar disorder symptoms had receded during the time in which [DOCTOR 1] conducted her assessment (July 2008), and DDD unreasonably refuses to accept the resulting, qualifying VABS score. WAC 388-823-0420 gives the Department the authority to terminate or deny eligibility if it cannot determine that an individual's limitations in adaptive functioning are attributable to the developmental disability (here, autism), or if they are attributable to some unrelated illness or injury. Here, however, a VABS assessment was conducted during a time in which a mental illness was successfully treated and controlled, and the Department refuses to accept that score simply because [APPELLANT'S NAME] continues to carry the mental illness diagnosis and is not "cured" of it. In this case, there is more than substantial evidence on the record as a whole that the Appellant's mental illness symptoms had receded to the point where it was possible to assess adaptive functioning limitations due to autism.

The BOA should add these necessary findings of fact that are missing from the Initial Order in this matter. The BOA should conclude that [APPELLANT'S NAME] has established that the substantial impairment in his adaptive functioning is attributable to his developmental disability, and not an unrelated illness or injury.

b. Additional Findings of Fact are necessary to determine the proper weight to be given to the conflicting expert opinions presented at the hearing in this matter.

The ALJ's Initial Order contains no statement of findings and conclusions regarding the Appellant's argument that [DOCTOR 1]'s opinion regarding the

Appellant's Vineland assessment deserves greater weight than that of Department witness Dr. McConnachie, which the ALJ was obligated to do under RCW 34.05.461. Here, the closest the ALJ came to addressing the matter was in Conclusion of Law No. 5: "the Appellant's argument is that [DOCTOR 1] is more than qualified to administer a Vineland . . ." The Order does not at all assess the weight that should be given to the conflicting expert opinions. The BOA should add the findings of fact described below that are evident from the record in this matter, and that are necessary to properly weigh the conflicting opinions in this case.

As described in the Appellant's Closing Brief at 16 – 18, [DOCTOR 1]'s opinion, as contained in her report, Exhibit 21, should be given greater weight than that of Dr. McConnachie for the following reasons:

1. His opinions were not based on a full review of all the entire record in the Appellant's case. There is also no evidence that indicates he interviewed the caregivers who were interviewed by [DOCTOR 1], and there is no evidence that he consulted with the Appellant's treating physicians at [FACILITY 1]. Moreover, Dr. McConnachie never consulted with [DOCTOR 1] on this matter.
2. Dr. McConnachie is clearly not a treating or even an examining physician in this matter, as he testified that he only met the Appellant once in 2004. Nor did he conduct a VABS functional assessment or any other kind of assessment in this matter.

It is well established that when weighing two contradictory medical opinions, one of an examining professional and one of a non-examining professional, more weight should be given to the opinion of the examining professional. See *e.g.*, *Pinneke v. Preisser*, 623 F.2d 546, 550 (8th Cir. 1980) and *Lester v. Chater*, 81 F3d 821 (9th Cir 1995) citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990), and *Gallant v. Heckler*, 753 F2d. 1450 (9th Cir. 1984).

More weight should also be given to [DOCTOR 1]'s opinion simply based on her credentials. While both doctors have extensive academic pedigrees and professional backgrounds, [DOCTOR 1]'s exceeds that Dr. McConnachie in terms of length of time in practice, scope of practice, number of publications, professional affiliations, and memberships in learned and professional societies.

[DOCTOR 1] has been a licensed psychologist for 14 years longer than Dr. McConnachie, and has a Ph.D. in Neurological Psychology, whereas Dr. McConnachie as a Ph.D. in Clinical Psychology.⁵ [DOCTOR 1] has 20 publications (Exhibit I at 15 – 16) to Dr. McConnachie's 11 (Exhibit 43 at 1 – 2). Since receiving his Ph.D. 16 years ago, Dr. McConnachie has been an employee of DDD the entire time. Exhibit 43 at 4. His most recent teaching experience includes "Positive Behavioral Interventions: Assessment and treatment" for Region [NUMBER] of DDD, and his *curriculum vitae* indicates he has held this

⁵ [DOCTOR 1] received her license as a Psychologist in 1979 (Exhibit I at 4). She received her Ph.D. in Neuropsychology in 1977 (Exhibit I at 1). Dr. McConnachie received his Ph.D. in Clinical Psychology in 1993 (Exhibit 43 at 1), and began work as a Psychologist for DDD in 1993 (Exhibit 43 at 4).

role since 1996. Exhibit 43 at 3. Whereas, [DOCTOR 1] was a Clinical Assistant Professor of Neurology at the [SCHOOL 1], Health Sciences Center in [CITY 1], Washington, for 19 years. Exhibit I at 4. Finally, Dr. McConnachie appears to be a member of only two professional societies the Association for Positive Behavior Support and the National Association on Dual Diagnosis. Exhibit 43 at 8. Whereas, [DOCTOR 1] has 16 active memberships in learned and professional societies, as indicated in her *curriculum vitae*. Exhibit I at 3. Also as of 2008, she was the President of the [SOCIETY 1]. Exhibit I at 4.

The BOA should add these necessary findings of fact that are missing from the Initial Order in this matter, and should make explicit findings regarding the weight that should be given to [DOCTOR 1]'s report, and conclude that [DOCTOR 1]'s professional opinion deserves greater weight than that of Dr. McConnachie.

V. Conclusion

Appellant [APPELLANT'S NAME] is requesting that the Board of Appeals add necessary findings of fact and correct the factual errors and errors of law in the attached Initial Order in his case. In view of the substantial evidence in this matter that [APPELLANT'S NAME] remains eligible for DDD services under the Department's rules based on his life-long autism and his need for special treatment, the BOA should issue a Review Decision and Final Order that reverses the Department's proposed termination of [APPELLANT'S NAME]'s eligibility.

3. On February 4, 2010, the Department filed a Response to the Petition for Review. This Response stated:

Department of Social and Health Services (DSHS), Division of Developmental Disabilities (DDD), through its counsel Robert M. McKenna, Attorney General, and Jonathon Bashford, Assistant Attorney General, responds to appellant [APPELLANT'S NAME]'s request for review of the Initial Order in this matter.

[APPELLANT'S NAME]'s request for review is premised primarily upon a mischaracterization of the Initial Order. The Initial Order correctly applied WAC 388-823-0420(2) in this case to exclude consideration of [APPELLANT'S NAME]'s adaptive functioning testing because there was significant evidence that [APPELLANT'S NAME]'s mental illness has caused adaptive functioning impairments that prevent DDD from determining what, if any, adaptive functioning impairments [APPELLANT'S NAME] suffers as a result of his autism. Even if the testing were to be considered, the weight of the evidence demonstrates that [APPELLANT'S NAME]'s adaptive functioning deficits are largely if not completely the result of his mental health problems.

I. STANDARD OF REVIEW

Under the Administrative Procedure Act, a reviewing officer such as a DSHS Review Judge has all the decision-making power that the reviewing officer

would have had to decide and enter the final order had the reviewing officer presided over the hearing. RCW 34.05.464(4); *Kabbae v. DSHS*, 144 Wn. App. 432, 192 P.3d 903 (2008). The review judge must give due regard to the hearing officer's opportunity to observe witnesses in making credibility determinations, but otherwise has the power to review the record *de novo*, make his or her own findings of fact, and in the process set aside or modify the findings of the ALJ.

II. THE INITIAL ORDER IS BASED ON APPROPRIATE FINDINGS OF FACT

The record amply supports that [APPELLANT'S NAME] suffers from substantial limitations to his adaptive functioning. However, DDD is currently unable to determine the extent to which those limitations are due to autism rather than mental illness. In fact, the record overwhelmingly demonstrates that [APPELLANT'S NAME]'s functional limitations are caused primarily, if not entirely, by mental illness rather than by autism.

A. The Initial Order Correctly Found That [APPELLANT'S NAME]'s Adaptive Functioning Is Impaired By His Mental Illness.

Since 2005, [APPELLANT'S NAME] has carried a diagnosis of Bipolar I Disorder. From all indications, that illness and treatment has profound effects on his adaptive functioning.

Prior to [APPELLANT'S NAME]'s most recent hospitalization for mental health treatment, he was examined by [DOCTOR 2], who also conducted a record review as part of her Psychosocial Evaluation and Risk Assessment. (Ex. 9.) She noted that [APPELLANT'S NAME] "is able to independently groom and dress himself and keep his residence in good order when things are going well for him. When he decompensates, his ADLs [activities of daily living] suffer." (Ex. 9, at 10; see Ex. 22, at 1 (noting "decrease in self-care, grooming, and ADLs" during manic episode).) "[W]hile he is stable much of the time, there are periods when he displays psychotic symptoms and loses touch with reality . . . [APPELLANT'S NAME] has . . . [an] ability to function independently for periods of time." (Ex. 9, at 21.) The record demonstrates that [APPELLANT'S NAME]'s mental illness interferes with his ability to function in a normal manner, and that in fact when not impeded by the symptoms of mental illness he functions well.

As [APPELLANT'S NAME] points out in his request for review, there is some indication in the record that at the time of the July 2008 Vineland test, [APPELLANT'S NAME]'s condition had improved as compared to his most severe episodes of psychosis. He was placed on proper medication; his bipolar symptoms "fell off greatly." (Testimony of [NAME 1], CD2, 1:24:10 - 1:27:00.) However, it is clear that the Bipolar I Disorder diagnosis was still appropriate in the summer and fall of 2008. (*E.g.*, Testimony of [NAME 1], CD2, 1:39:20.) And while [APPELLANT'S NAME]'s symptoms had fallen off from their peak, there is no indication that they had disappeared entirely. Less than two weeks after [DOCTOR 1] conducted the Vineland test, [APPELLANT'S NAME]'s physician noted "multiple episodes [during that reporting period] of . . . increase in manic symptoms." (Ex. 26, at 2.) The last [FACILITY 1] record prior to [DOCTOR 1]'s report shows that [APPELLANT'S NAME] "continue[d] to make progress in his

recovery” (Ex. 38, entry for 7/21/08, 4:30), which implies that [APPELLANT’S NAME] had not fully recovered his pre-mental-illness functioning. In October, he was still making “substantial progress” in a number of areas including “self-care” (Ex. 38, entry for 10/20/08, 11:10 AM (final page of exhibit)), though his bipolar disorder was either unchanged or worsening (Ex. 27, at 2). In November, [APPELLANT’S NAME] was still demonstrating extreme disorientation or psychosis: a DDD staff member met with [APPELLANT’S NAME] at [FACILITY 1] and noted that [APPELLANT’S NAME] was confused about whether or not he was in Africa. (Ex. 37, at 3.) There is no evidence in the record that [APPELLANT’S NAME] was, in July 2008, functioning at his pre-mental illness level, and overwhelming evidence that he was not.

B. [APPELLANT’S NAME]’s Current Mental Illness Causes Adaptive Functioning Deficits, By Definition.

The record demonstrates that the onset of [APPELLANT’S NAME]’s mental illness has been associated with severe limitations on his adaptive functioning. Even without those details, the mere fact of [APPELLANT’S NAME]’s ongoing diagnosis of Bipolar I Disorder shows that he has impaired adaptive functioning as a result of a mental illness. Bipolar I Disorder by definition involves impairments to an individual’s adaptive functioning, so DDD cannot accept or conduct current adaptive functioning testing on individuals with a diagnosis of Bipolar I.

During the summer and fall of 2008, [APPELLANT’S NAME] continued to be diagnosed with “Bipolar I Disorder, most recent episode manic with psychotic symptoms.” No report shows that the illness was cured and the diagnosis lifted.

An individual experiencing a manic episode is, by definition, subject to impaired adaptive functioning due to the illness. One criterion for a diagnosis of a manic episode is that the individual be experiencing a mood disturbance “sufficiently severe to cause marked impairment in occupational functioning or in usual social activities or relationships with others, or to necessitate hospitalization to prevent harm to self or others, or there are psychotic features.” (Ex. 39, at 362.) All of those options involve adaptive functioning impairments: occupational functioning is itself a synonym for adaptive functioning (Testimony of Dr. McConnachie); social skills are one aspect of adaptive functioning (see Ex. 21, at 3 (Vineland); Ex. 42, at 96 (ICAP)); and the need for hospitalization and psychosis also reflect severe deficits in adaptive functioning. Because a person must be diagnosed with a manic episode in order to be diagnosed with Bipolar I, it is not possible for a person to be diagnosed with Bipolar I Disorder without experiencing impairments in adaptive functioning. (Testimony of Dr. McConnachie, CD1, 2:21:00.)

Nor was [APPELLANT’S NAME] ever given a diagnosis of Bipolar I with a specifier that the illness was in remission. Under a DSM-IV diagnosis of Bipolar I Disorder, most recent episode manic, the illness may be given a specifier of either Partial Remission or Full Remission if the patient does not currently meet the criteria for a manic episode. (Ex. 41, at 414.) “If the full criteria are not currently met for a Manic Episode,” practitioners are instructed to “specify the current clinical status of the Bipolar I Disorder and/or features of the most recent

Manic Episode” including whether the disorder is “In Partial Remission” or “In Full Remission.” (Ex. 40, at 389.) The lack of a remission specifier indicates that [APPELLANT’S NAME] continued to experience the symptoms of a manic episode (including adaptive functioning deficits) at that time and up through the present.

As explained by Dr. McConnachie, the current consensus of the psychology field is that a person with a continuing diagnosis of Bipolar I Disorder is likely to experience adaptive functioning deficits. Even in clinical remission, bipolar disorder is associated with “marked reductions in functioning and well-being[.]” (Ex. 44, at 313.) The illness is “associated with poor functional outcome.” (Ex. 45, at 1; see Ex. 46 (abstracts of peer-reviewed articles demonstrating the same).) There is no indication that [APPELLANT’S NAME] has returned to the levels of functioning that he had prior to the onset of his mental illness.

Notably, Bipolar Disorder is not [APPELLANT’S NAME]’s only mental illness. For instance, his diagnosis of ADHD also by definition causes functional impairments. (Testimony of Dr. McConnachie, CD2, 29:00.) He has carried that diagnosis since the age of nine. (Ex. 23.)

Even without the substantial record of [APPELLANT’S NAME]’s individual adaptive functioning deficits due to his mental illness, DDD could not accept or conduct adaptive functioning testing given his continuing diagnoses of Bipolar I Disorder and ADHD. To do so would be fruitless, because any test would capture the deficits resulting from mental illness as well as those resulting from autism. Nobody can currently determine what, if any, functional impairments [APPELLANT’S NAME] has as a result of his autism alone (Testimony of Dr. McConnachie); and under WAC 388-823-0420(2), DDD is barred from attempting that impossible task.

C. [DOCTOR 1]’s Vineland Test Captures The Effects Of Mental Illness.

Despite [APPELLANT’S NAME]’s history of mental health problems that by definition impact adaptive functioning, [DOCTOR 1] found “no evidence or history to suggest the presence of any other adverse condition that could result in his adaptive limitations other than his autism.” (Ex. 21, at 4.) She concluded that “[APPELLANT’S NAME]’s current adaptive functioning is the result of . . . his autistic disorder, and is not the result of any other illness or injury.” (*Id.*) As discussed above, there is overwhelming evidence on the record to the contrary.

What’s more, the very severity of the deficits found by [DOCTOR 1] places her conclusion in doubt. A person with [APPELLANT’S NAME]’s diagnosis of verbal autism may indeed experience adaptive functioning deficits, but is likely to score much higher than did [APPELLANT’S NAME]. (See Ex. 47, at 149; Ex. 48.) In fact, [APPELLANT’S NAME] is repeatedly described in the record as having high-functioning autism. In 2005, [APPELLANT’S NAME] was found to have a full scale IQ score of 108, in the high end of the average range of intelligence. (Ex. 9, at 16.) Yet [DOCTOR 1]’s Vineland test scored [APPELLANT’S NAME] with the adaptive functioning level of a person with severe mental retardation. (Ex. 48; *compare* Ex. 21, at 3, *with* Ex. 47, at 142.)

Dr. McConnachie testified that he would not expect such low scores based solely on [APPELLANT'S NAME]'s diagnosis of high-functioning autism. (CD2, 5:10.) The ALJ was thus correct to reject [DOCTOR 1]'s report as evidence of any adaptive functioning impairments that [APPELLANT'S NAME] may suffer as a result of his autism.

Even if the results of [DOCTOR 1]'s test were to be considered, her conclusions are not credible in light of the extensive evidence to the contrary. Evidence presented at hearing raised serious questions about whether the Vineland test was conducted properly, given that [DOCTOR 1] interviewed respondents who had not spent time with [APPELLANT'S NAME] on a daily basis for three years. (Testimony of Dr. McConnachie, CD1, 2:03:10; Ex. 47, at 12.) Moreover, the Vineland test only measures the extent of any deficits; it does not test for the cause of those deficits. (Testimony of Dr. McConnachie, CD1, 2:07:00.) That [DOCTOR 1] would reach conclusions about causation without any scientific basis places her credibility as an expert informant into doubt. If any consideration of the respective credibility of [DOCTOR 1]'s report and Dr. McConnachie's testimony is necessary, [DOCTOR 1]'s report should be discounted considering the weight of the record showing that her conclusions were not credible.

III. THE INITIAL ORDER WAS NOT BASED UPON ERRORS OF LAW

A. DDD Eligibility Under The Condition Of Autism Requires That Current Adaptive Functioning Deficits Must Be Attributable To Autism, And Not To Mental Illness.

In order to be eligible for DDD services under the category of Autism, [APPELLANT'S NAME] must show evidence of current adaptive functioning deficits. To establish current adaptive functioning deficits, an applicant may submit a current (less than three years old), qualifying adaptive functioning score from either the Vineland Adaptive Behavior Scales (VABS or Vineland) or the Scales of Independent Behavior – Revised (SIB-R). WAC 388-823-0420(1). If the applicant does not submit a VABS or SIB-R score, DDD will normally administer an Inventory for Client and Agency Planning (ICAP). WAC 388-823-0420(1)(c). However,

If DDD is unable to determine that your current adaptive functioning impairment is the result of your developmental disability because **you have an unrelated injury or illness that is impairing your current adaptive functioning:**

- (a) **DDD will not accept the results of a VABS or SIB-R administered after that event and will not administer the ICAP;** and
- (b) Your eligibility will have to be determined under a different condition that does not require evidence of adaptive functioning per a VABS, SIB-R or ICAP.

WAC 388-823-0420(2) (emphasis added). Because [APPELLANT'S NAME] has a mental illness, Bipolar I Disorder, which is unrelated to his autism and which

impairs his current adaptive functioning, the ALJ was correct not to accept the results of any adaptive functioning testing administered after the onset of that illness.

B. DDD's Eligibility Determination Was Based On Rule, Not Policy Or Interpretive Statement.

[APPELLANT'S NAME] argues that DDD has engaged in unlawful rule-making by requiring him to be cured of his mental illness before accepting the results of his Vineland test. That argument is based on a mischaracterization of the ALJ's initial order, which relied only upon WAC 388-823-0420(2).

It is also a mischaracterization of the testimony of DSHS staff. Linda Lundsford (Hearing CD2, 1:05:00) testified that DDD would accept an adaptive functioning score from an individual who had been diagnosed with a mental illness only if the individual was "cured" in the sense that he was no longer experiencing the effects of (that is, the adaptive functioning deficits associated with) that illness. She correctly explained that DDD rules do not explicitly say what must change for an autistic individual to become DDD eligible if that individual currently does not have qualifying evidence of adaptive functioning deficits as a result of interfering mental illness. However, it is clear that Ms. Lundsford's interpretation was a direct and logical application of WAC 388-823-0420 to a hypothetical presented by Appellant's counsel, not a lawless policy interpretation of statute. WAC 388-823-0420(2) explains that *if* the presence of a mental illness is impairing an individual's current adaptive functioning, *then* DDD will not accept or conduct adaptive functioning testing. The logical contrapositive of that statement is that DDD *may* accept or conduct adaptive functioning testing *only if* such mental illness is not present. Ms. Lundsford accurately explained that possibility,⁶ describing the subsequent disappearance of a mental illness or its symptoms as a "cure" of the illness. While she was correct that the contrapositive statement is not contained in the text of the rule, it is logically required by the rule itself. The ALJ was correct to reject, under WAC 388-823-0420(2), evidence of adaptive functioning deficits that could not be traced to [APPELLANT'S NAME]'s autism alone.

IV. CONCLUSION

[APPELLANT'S NAME] has Bipolar I Disorder and Attention Deficit Hyperactivity Disorder, and did at the time of the adaptive functioning testing that [APPELLANT'S NAME] has offered. Those mental illnesses do (by definition and in fact) cause adaptive functioning deficits unrelated to [APPELLANT'S NAME]'s autism. As a result DDD cannot determine that [APPELLANT'S NAME]'s adaptive functioning impairments are caused by autism alone.

As the ALJ determined, WAC 388-823-0420(2) thus resolves this case entirely. [APPELLANT'S NAME] has not shown what deficits (if any) he

⁶ Ms. Lundsford also stated that DDD might accept non-current testing of adaptive functioning, pre-dating the onset of mental illness, as evidence of what portion of current adaptive functioning is attributable to developmental disability alone. As [APPELLANT'S NAME] did not present any evidence of his pre-mental-illness adaptive functioning deficits, there is no need to consider that possibility here.

experiences as a result of his developmental disability of autism. His termination from DDD eligibility must be affirmed.

II. FINDINGS OF FACT

The undersigned has reviewed the audio recording of the hearing, all of the exhibits, the Initial Order, the Appellant's petition for review, and the Department's response and enters the following factual findings, having given due regard for the opportunity of the ALJ to observe the demeanor of the witnesses.⁷ To a large extent the Initial Findings of Fact have been adopted and incorporated into this decision. Changes and additional findings have been entered by the undersigned where appropriate.

1. The Appellant is [APPELLANT'S NAME]. He was born [DATE], 1983. He has been a recipient of services from the Division of Developmental Disabilities (DDD) of the Department of Social and Health Services (Department) since 2001.⁸ At the time of the hearing in this matter he resided in a group home in [CITY 2], Washington. Previous to that he resided for a period of years in [FACILITY 1].

2. Kay Stotesbery is an intake worker for DDD. She is a qualified mental retardation professional (QMRP). She evaluated the Appellant's first application for DDD services in 2001 and found that he did not qualify for services. At the time, the Appellant had a diagnosis of Asperger's syndrome. Shortly afterward, [DOCTOR 3] changed his diagnosis to autism.⁹ The Appellant was then found eligible for DDD services.¹⁰

3. Effective July 2, 2005, DDD eligibility rules were amended. DDD eligibility now requires both a valid qualifying diagnosis and, in addition, a showing that the diagnosed

⁷ RCW 34.05.464(8).

⁸The Appellant is variously referred to in case documentation as [APPELLANT'S NAME] or [APPELLANT'S NAME-SHORTENED]. He also at one time referred to himself as a woman named [NAME 2]. More recently he refers to himself as [NAME 3]. See, e.g., Exhibits 11, 12 and 38; testimony of [NAME 1].

⁹ Exhibit 7.

¹⁰ At that time the Appellant was not required to demonstrate a deficit in adaptive functioning in order to be eligible for "autism" services.

condition results in substantial limitations to the client's adaptive functioning before a client is found eligible for services.

4. In the fall of 2006, Ms. Stotesbery reviewed the Appellant's eligibility for DDD services. The Appellant had requested paid services; anyone who had not had paid services in the previous ninety (90) days has to be evaluated. Most of his diagnoses were for Asperger syndrome. By Planned Action Notice (PAN) dated October 11, 2006, the DDD notified the Appellant of its intended termination of DDD services. The stated basis for the proposed termination was that there was insufficient evidence of a disability attributable to autism because the Appellant did not have early delays in language.

5. Following a timely hearing request appealing the PAN, an Initial Order was entered under administrative Docket Number [ANOTHER DOCKET NUMBER] on [DATE 2], 2007. That Initial Order held that there was sufficient evidence of the Appellant's autism, and that the onset of that condition was prior to the age of three years. The Initial Order remanded the case to the DDD to determine whether the Appellant had adaptive functioning limitations due to autism.¹¹ On review, the Department's Board of Appeals reversed the Initial Order. The Appellant appealed the matter to Superior Court. By order entered on January 25, 2008, by Superior Court Judge Kathryn J. Nelson, under [COUNTY] County Docket Number 07-2-07761-3, the Final Order of the Department's Board of Appeals was reversed, and the [DATE 2], 2007, Initial Order under administrative Docket Number [ANOTHER DOCKET NUMBER] was reinstated. In addition, the matter was remanded to the Department for further proceedings consistent with the Superior Court Order.¹²

6. Because neither the [DATE 2], 2007, Initial Order nor the January 25, 2008, Superior Court Order established whether or not the Appellant's autistic condition resulted in

¹¹ Ex. 2, p. 9.

¹² Exhibit 1.

substantial limitation of his adaptive functioning, the DDD reviewed that issue as required by the Superior Court Order.

7. In order to receive services from the DDD, a person with autism must present a current functional assessment that shows that they have deficits in adaptive functioning caused by the autism. To do so, they must present a Vineland, SIB-R, or ICAP test showing their ability to take care of themselves and function. The ICAP is performed by the Department, and is only done if neither of the other two tests is available. The test must result in an adaptive assessment score of more than two standard deviations below the mean. The Vineland or SIB-R must have been done within the past three years, the ICAP within the last two years.¹³

8. Eligibility is based on the current presentation and assessments. There are no automatic disqualifications. DDD staff review the evidence that is submitted. It is very difficult to find eligible a person who is mentally ill, and has a qualifying impairment. Such a person would need evidence of adaptive functioning before the onset of mental illness or after the cure of mental illness because tests of adaptive functioning do not identify the cause of the deficits. All of the mental illnesses with which the Appellant has been diagnosed cause adaptive functioning deficits. These deficits are a part of the definition of the mental illness. Tests of adaptive functioning can only measure whether any deficits are caused by autism if there are no other co-morbidities also causing adaptive functioning deficits.

9. Ms. Stotesbery contacted [FACILITY 1] to obtain a copy of the Appellant's file. She reviewed a huge file with over 1000 "pieces of paper" in it. The records indicated that the Appellant was significantly mentally ill.¹⁴

10. Ms. Stotesbery did not perform an ICAP test because her review of the [FACILITY 1] records determined that the Appellant was significantly mentally ill. The mental

¹³ Ex. 3.

¹⁴ Ex. 37.

illness would lower the Appellant's adaptive functioning, and Ms. Stotesbery would not be able to tell what portion of the adaptive functioning deficits were due to the Appellant's autism.

11. The Appellant was hospitalized on February 23, 2001, at the [FACILITY 2] in [CITY 3]. He was sent there for a probation violation. His attorney successfully argued that because of a mental history past, he should be sent to a psychiatric hospital instead of a detention center. The Appellant's [RELATIVES] sought to have him admitted to [FACILITY 3], but his [RELATIVE] said he was rejected there because he was "too high functioning and too psychotic"¹⁵ to qualify for services. The physician who treated the Appellant opined that the Appellant "actually may have paranoid schizophrenia rather than the previously labeled Asperger's Disorder."¹⁶

12. Autism has a consistent effect on adaptive functioning. The Appellant has had times when he was lucid, and managed well. He has had IQ tests that were average. You can never have a day when you don't have autism, and there is no cure for autism. The Appellant worked for [RETAIL STORE] for a time and demonstrated decent skills.¹⁷

13. With mental illness, adaptive functioning goes up and down. The pattern of the Appellant's adaptive dysfunction is consistent with mental illness and is not consistent with autism.

14. In August 2005, the Appellant was referred to clinical psychologist [DOCTOR 2], PhD, SOTP for a psychosocial evaluation and risk assessment. The DDD received her report on August 24, 2005.¹⁸ Her report is Exhibit 9. [DOCTOR 2] diagnosed Autistic Disorder, Tourette's Disorder, ADHD, and Bipolar I Disorder. She found that the Appellant's primary areas of risk involved vulnerability to exploitation by others and potential self-injurious behavior when he is decompensating. In reference to his adaptive functioning, [DOCTOR 2]'s report

¹⁵ Ex. 5, p. 2, 4.

¹⁶ Ex. 6, p. 1.

¹⁷ Id., p. 1.

¹⁸ Ex. 9.

notes: “He is able to independently groom and dress himself and keep his residence in good order when things are going well for him. When he decompensates, his ADLs suffer.”¹⁹

[DOCTOR 2] noted: “Fortunately, there are clear signs of [the Appellant’s] impending decompensation (e.g., decrease in ADL competency, property destruction, changes in communication content) . . .”²⁰ The Appellant’s adaptive functioning is good when his mental illness is in check, and poor when his mental illness gets worse. Thus, his mental illness is at least the major cause of his adaptive dysfunction. [DOCTOR 2]’s study was done when the Appellant was in an independent living context. When he was not experiencing the negative effects of mental illness he could function quite well; i.e. his adaptive functioning was good. When the Appellant was decompensating he drank anti-freeze; cut himself; threatened his [OTHER RELATIVE] with a knife; and assaulted his [RELATIVE], injuring her hand.²¹

15. [DOCTOR 2]’s evaluation also showed the results of Intelligence Quotient (IQ) testing for the Appellant over past years. In her testing, the Appellant “achieved a Verbal IQ of 115 (High Average), a Performance IQ of 99 (Average), and a Full Scale IQ of 108 (high end of the Average range). These scores indicate that he has no deficits.”²² In 1994, at age 11, he had a verbal IQ of 105, a performance IQ of 60, and a full scale IQ of 87. At age 13, his verbal IQ was found to be 119, his performance IQ 80, and his full scale IQ 100. In 2000, at age 17, he was found to have a verbal IQ of 94, a performance IQ of 70, and a full scale IQ of 83.²³ [DOCTOR 2] opined that the Appellant’s current scores may have been higher than his previous scores due to lack of effort and/or interest during his teen years.²⁴

16. [DOCTOR 2] re-examined the Appellant and issued a Risk Assessment Update on January 5, 2006. In relevant part, that update includes the following:

¹⁹ Id., p. 10. ADLs are activities of daily living. Decompensating is a mental illness term for getting worse.

²⁰ Id. p. 21.

²¹ Id., p. 5 – 6, 11.

²² Id., p. 16.

²³ Id.

²⁴ Id., p. 17.

[the Appellant] was referred by the Division of Developmental Disabilities regarding concerns involving physical aggression toward his [RELATIVES], self-injurious behaviors, his vulnerability to exploitation by others, and periodic psychiatric decompensation. I subsequently completed a psychological evaluation and risk assessment of [the Appellant] on August 22, 2005, and results supported diagnoses of Autistic Disorder, Tourette's Disorder, Attention-deficit/Hyperactivity Disorder, and Bipolar I Disorder. [The Appellant] was determined to be low risk in terms of potential harm toward others but at higher risk in terms of risk of self-injurious behaviors, vulnerability to exploitation by others, and periodic psychiatric decompensation. It was noted that there were clear signs of impending decompensation, such as a decrease in ADL competency, property destruction, changes in communication content, and changes in behavioral routines.²⁵

[DOCTOR 2]'s assessment then describes a period of decompensation caused by medication non-compliance which led to a series of dangerous and self-destructive incidents. These incidents included his removal of and attempt to set fire to his clothing in an elevator at [HOTEL 1] on November 13, 2005.²⁶

17. On February 13, 2007, the Appellant was admitted to [FACILITY 1] for competency restoration after being charged with felony Arson.²⁷ The Appellant's diagnoses were: 296.4 Bipolar I Disorder, Most Recent Episode Manic with Psychotic Features; 302.85 Gender Identity Disorder; and 299.80 Asperger's Disorder. Bipolar Disorder reduces adaptive functioning skills. When the Appellant was medication compliant (mental illness medications) he did well. His failures were a result of chronic mental illness. Exhibits 11 through 15 are the Appellant's treatment plan/patient data sheets from [FACILITY 1]. Exhibit 12 reveals that the Appellant's mental illness was getting worse. He had fifteen episodes of restraint. He had forced medication. He attempted to put metal objects into electrical sockets or the microwave oven. He gave himself enemas with soda bottles. Exhibit 13 indicates that the Appellant was still on forced medication, and showed aggression to staff. Exhibit 14 shows that the Appellant's mental illness had not subsided. Exhibit 15 indicates that the Appellant continued to carry a diagnosis of Bipolar I with psychotic features. He was still on forced medication. Every entry in

²⁵ Ex. 10, p. 1.

²⁶ Id.

²⁷ Ex. 11.

Exhibit 17 shows that the Appellant continued to need restraint between July 29, 2007, and August 10, 2007. In Exhibit 18, [FACILITY 1] records indicate that the Appellant continued to show symptoms of mental illness, including screaming, kicking, spitting, and threatening. He heated water in a microwave oven, then threatened to throw hot water in the hospital staffs' eyes. He was found with two plastic knives under the waistband of his shorts, and was placed in five-point restraints after a Code Green was called. Exhibit 26 is a patient data sheet dated August 4, 2008. It continues to show the Appellant as a patient who is Bipolar I with psychotic features. Exhibit 38 contains the Appellant's progress record from [FACILITY 1] from June 29, 2008, through November 17, 2008. This was another document used by the DDD in making its determination that the Appellant had significant mental illness that caused substantial impairment in adaptive functioning. All of the exhibits containing notes from [FACILITY 1] show that the Appellant was experiencing significant symptoms of mental illness. [FACILITY 1] could not have kept him as a patient if he was not mentally ill. The Appellant had significant mental illness that caused substantial impairment in his adaptive functioning.

18. The Appellant completed the Kohlman Evaluation of Living Skills (KELS) on April 7, 2008. The test was administered by [NAME 4], an Occupational Therapist 3 at [FACILITY 1]. [NAME 4] found:

He was able to remain task and reality focused for 90 minutes with one short break. The KELS is an interview/task oriented evaluation which assesses eighteen living skills under five major headings. The scores are "needs assistance" or "independent." A score of 5 ½ or less indicates the client is able to live independently. A total score of six or more indicates the client needs assistance to live in the community. [The Appellant's] score was 2.5 which indicates that he was able to correctly respond to 13.5/16 of the task demands. These task demands required his ability to follow multiple instructions, to complete multiple mathematical computations in his head and on paper, to locate resources independently in the phone book, to correctly complete writing a check and balancing the deduction in checkbook with one verbal cue, to complete a monthly budget, and to verbalize the appropriate responses for safety and health scenarios.²⁸

The tasks tested in Exhibit 16 are similar to the task tested in the ICAP.

²⁸ Ex. 16, p. 1.

19. Before it made its termination decision of January 6, 2009, the DDD reviewed the July 23, 2008, Neuropsychological Consultation prepared by [DOCTOR 1].²⁹

20. On January 7, 2009, the DDD issued another PAN, again notifying the Appellant that he was not eligible for DDD services, and that such eligibility was being terminated.

The review included consideration of the following records:

1. Records reviewed in the previous eligibility review, which resulted in the Department's determination that [the Appellant] did not meet eligibility criteria:
 - a. [FACILITY 2], history and physical – February 2001;³⁰
 - b. [FACILITY 2], psychiatric progress notes – March 14, 2001;³¹
 - c. [FACILITY 4], letter from [DOCTOR 3] – October 7, 2001;³²
 - d. [FACILITY 5], history and physical, [DOCTOR 4], M.D. – May 19, 2005;³³ and
 - e. Psychosocial Evaluation and Risk Assessment, [DOCTOR 2], Ph. D. – August 22, 2005.³⁴
2. Recent [FACILITY 1] records:
 - a. Treatment Plan/Patient Data Sheet – August 27, 2007, February 12, 2008, March 7, 2008, April 7, 2008, and May 30, 2008;³⁵
 - b. Progress Records notes, [NAME 4], OTR/L – August 15, 2008;³⁶ and
 - c. Medication and Treatment Orders (daily progress notes) – August 10, 2007 through June 27, 2008.³⁷
3. Letter from Alberto Casas, staff attorney with Northwest Justice Project, to Assistant Attorney General Kim Cozzezetto, Dated October 15, 2008,³⁸ and the attached July 23, 2008 Neuropsychological Consultation report of [DOCTOR 1], Ph.D.³⁹

In relevant part, that PAN states:

Based upon a review of the totality of information available, the Department is unable to determine that [APPELLANT'S NAME]'s current adaptive functioning is the result of the Autistic Disorder diagnosis because of the extensive and ongoing history of serious mental health problems.

...

²⁹ Id.

³⁰ Ex. 5.

³¹ Ex. 6.

³² Ex. 7.

³³ Ex. 8.

³⁴ Ex. 9.

³⁵ Exs. 11, 12, 13, 14, and 15.

³⁶ Ex. 16.

³⁷ Ex. 17, 18, 19,

³⁸ Ex. 20.

³⁹ Ex. 21

Accordingly, the Department must determine that [APPELLANT'S NAME] does not meet DDD eligibility criteria.⁴⁰

21. The Appellant timely requested an administrative hearing to contest the DDD's termination. The appeal letter is dated February 10, 2009, and it was received by the [CITY 4] Office of Administrative Hearings on that date.

22. At hearing on July 23, 2009, the Appellant's representative stipulated that the only potential avenue of DDD eligibility for the Appellant is pursuant to his concededly valid diagnosis of autism, and is not sought based upon the other qualifying conditions of mental retardation, cerebral palsy, epilepsy, or another neurological or other condition closely related to mental retardation or requiring treatment similar to that required by persons with mental retardation. This means that Autistic Disorder alone must be the cause of deficits in adaptive functioning sufficient to qualify under the rules.

23. The Appellant has a long history of serious mental health problems. Beginning at age seven, in approximately 1990, he was diagnosed with and medicated for Tourette's syndrome and Pervasive Developmental Disorder. At age eight he was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Tourette's syndrome with compulsive features. Between then and 1999, he was additionally diagnosed with Pervasive Developmental Disorder, Obsessive Compulsive Disorder, Attention Deficit Hyperactivity Disorder (ADHD), Asperger's Syndrome or Disorder, Oppositional Defiant Disorder, major depression, and an anorexic episode. In 2001 he was diagnosed with probable schizophrenia and psychosis, NOS [Not Otherwise Specified]. He was also diagnosed with autism at that time. He was diagnosed with Borderline Personality Disorder at the age of 20, in approximately 2003 or 2004, and at the age of 21 he was diagnosed with Bipolar I. As of the time of hearing in this matter, the Appellant was still diagnosed with Bipolar I, with the most recent episode being manic with psychotic features.

⁴⁰ Ex. 3, p. 11.

24. The Appellant has demonstrated ongoing violent and self-destructive behavior. The record shows that he was arrested for assaulting his [RELATIVE] in 2001, drank antifreeze (without renal damage) at the age of 20, and engaged in self-cutting as well. He has repeatedly taken himself off of his medications, and has been arrested on various occasions. In the summer of 2003, he identified himself as transgendered, and asked to be called [NAME 3]. On one occasion in May 2005, after decompensating for two to three weeks, he threatened his [OTHER RELATIVE] with a knife, and then turned it upon himself. His [OTHER RELATIVE] then called the police.

25. The Appellant was institutionalized at [FACILITY 1] from May 2006 until July 10, 2009, save for brief periods of incarceration. Since his release from [FACILITY 1], he has resided at a group home managed by a psychiatric care provider. The Appellant's condition has shown periodic improvement, when properly medicated, but at no point has he been diagnosed as no longer having Bipolar I Disorder.

26. The Appellant consulted Certified Clinical Neuropsychologist [DOCTOR 1] concerning his adaptive functioning limitations. The Appellant did not call [DOCTOR 1] to testify. The Appellant did not call any Board Eligible Neurologist, Board Eligible Psychiatrist, Licensed Psychologist, or Board Certified Developmental and Behavioral Pediatrician to testify. [DOCTOR 1]'s report is included in the record as Exhibit 21. It states that she performed a Vineland-II Adaptive Behavior Scales assessment of the Appellant's personal and social skills.⁴¹ [DOCTOR 1] conducted the Vineland evaluation on July 23, 2008, and issued a four-page Neuropsychological Consultation which set out the assessment results as well as her own summary and impressions.⁴² At the time of her evaluation, the Appellant was a resident of [FACILITY 1]. [DOCTOR 1] never met or interviewed the Appellant. [DOCTOR 1] did not interview anyone who had present day-to-day knowledge of the Appellant as of July 2008.

⁴¹The Vineland-II Adaptive Behavior Scales assessment, or test, is sometimes referred to in the hearing record as the "Vineland" and sometimes is called the VABS.

⁴² Ex. 21.

27. As shown in [DOCTOR 1]'s report, in conducting the Vineland, she interviewed the Appellant's [RELATIVES] and prior caretakers. The Appellant's [RELATIVE], [NAME 1], is a published psychotherapist. He is not a Board Eligible Neurologist, Board Eligible Psychiatrist, Licensed Psychologist, or Board Certified Developmental and Behavioral Pediatrician.⁴³ The other parties interviewed were [FACILITY 6] Coordinator [NAME 5] and Training Coordinator [NAME 6] of [FACILITY 7] ([FACILITY 7]), the facility where the Appellant resided prior to his May 2006 institutionalization at [FACILITY 1]. Their knowledge of the Appellant's condition was limited to the period that the Appellant was at [FACILITY 7] in 2005 and early 2006.

26. [DOCTOR 1]'s Vineland results differ substantially from those that might be expected from a person of the Appellant's IQ level whose mental diagnosis is limited to autism. The graph lines in Exhibit 48, from top to bottom, represent expected Vineland scores for persons with "Autism Verbal," "Autism Non-Verbal," "Moderate Mental Retardation," Vineland scores resulting from interviewing [FACILITY 7] personnel, Vineland results from interviewing the Appellant's [RELATIVES], and "Severe Mental Retardation." These graph lines show substantial disparity between limitations claimed by the evaluation respondents and those which might be attributable to autism alone.⁴⁴

27. After reviewing Exhibit 21, Ms. Stotesbery did not change her opinion that the Appellant does not qualify for DDD services because her review of the records shows that severe mental illness is interfering with DDD's ability to evaluate his functional ability.

28. Dr. Gene Alan McConnachie has a Ph.D. in Clinical Psychology. He is a Licensed Psychologist in Washington State. Dr. McConnachie was the DDD expert witness in this matter. He is familiar with assessments of adaptive functioning, and uses them in his practice. An adaptive functioning test measures a person's abilities in ADLs. For adaptive

⁴³ Diagnosis of Autism by an appropriate diagnostician must be made by a Board Eligible Neurologist or Board Eligible Psychiatrist or Licensed Psychologist or Board Certified Developmental and Behavioral Pediatrician. WAC 388-823-0500 through 388-823-0515.

⁴⁴ See Ex. 48.

functioning scores to be valid, the test administrator must follow the rules for administering the test, and interpret the results in terms of a person's other abilities. The DDD seeks to measure adaptive functioning at the time of testing. It seeks to have test results that are not affected by factors such as mental illness or institutionalization. Institutionalization takes away the opportunity to show behaviors in the community.

29. The Vineland test must be administered to the person who knows the subject best from day-to-day. Twenty percent of the questions on the Vineland cannot be answered with a valid response for persons who are hospitalized.

30. The Vineland Survey Forms Manual stresses the importance of selecting proper respondents in order to conduct a valid Vineland assessment. In relevant part, the manual includes the following language:

Selecting the Respondent

Careful selection of a qualified respondent is critical for obtaining valid results with either Survey form. The respondent must be the adult who is most familiar with the everyday behavior of the individual being evaluated. In general, the respondent should have frequent contact with the individual (preferably every day) over an extended period of time to allow multiple opportunities to observe the individual's responses to a variety of environmental demands.

. . .

For an adult, respondents may include a spouse or other adult family member, a professional caregiver in a residential or nonresidential facility, a counselor, or a work supervisor.

. . .

In some circumstances, because of a lack of sufficient knowledge of an individual's activities in all domains, more than one respondent may be necessary. However, only one respondent should provide information concerning a given domain. . . . No normative data are based on multiple respondents. . . .⁴⁵

[DOCTOR 1] selected respondents who did not have current day-to-day contact with the Appellant. She chose multiple respondents. Her administration was inappropriate. In the case of the Appellant's [RELATIVES], the Appellant had been away from home for three and one-half years, and at [FACILITY 1] for two years. [FACILITY 7] had had no contact with the Appellant

⁴⁵ Ex. 47, p. 3 [designated p. 12].

for three years. It is not valid to use the Vineland to measure current functioning based on past behavior because: 1) you need to measure current functioning, and 2) people's memories are not good for a period two or more years previous to the time of test administration.

[DOCTOR 1]'s tests using the multiple past recollections of the Appellant's [RELATIVES] and [FACILITY 7] caregivers as respondents are not valid.

31. Even though the Appellant was living at [FACILITY 1] at the time of [DOCTOR 1]'s testing, she only reviewed records from the time previous to his living at the hospital. Nor did she speak with anyone at the hospital. Nor had she met the Appellant. In spite of this, [DOCTOR 1] states that all of the Appellant's adaptive problems are due to his autism, and not to mental illness. This is a stunning conclusion. The last ten to twenty years of well-established science on the effects of mental illness on adaptive functioning conclude that mental illness has a negative effect on adaptive functioning. For patients with Bipolar disorder, this is true even in the euthymic phase between manic and depressed phases.

32. To find out what the Appellant's abilities were before the onset of mental illness, we would need a Vineland study from that period. No test results for the period before the Appellant's first diagnosis of mental illness are available. Nor are any test results available for the period before the Appellant's first diagnosis of Bipolar I.

33. The Vineland test does not tell why the individual is performing as he is, only how he is performing. It is a summary of the person's abilities, not of the cause of any impairments in adaptive functioning. Even if [DOCTOR 1]'s test results were valid, the Vineland test she obtained could not be used to evaluate the Appellant's application, since they cannot factor out the effects of his mental illness.

34. Exhibit 23 shows the Appellant's medical diagnoses and medication history from age seven to age 21. A part of the definition each of the disorders listed in the diagnosis

column is that the patient experiences some kind of functional impairment.⁴⁶ These mental illnesses each cause adaptive functioning deficits.

35. The KELS test shown in Exhibit 16 was given to the Appellant three months before [DOCTOR 1]'s evaluation. This is a test often given in facilities to determine if people are ready to leave and go back home. The results show that the Appellant could live independently in the community. Dr. McConnachie was not surprised that the Appellant's score in this test varied from the result of [DOCTOR 1]'s test. When the Appellant is on his medication for mental illness he does much better. The variation is due to the stage of the Appellant's mental illness. People with mental illness wax and wane in their abilities. The Appellant, however, will never get back to the level of adaptive functioning he reached before his mental illness.

36. Persons with Bipolar disorder have a high rate of functional impairment.⁴⁷ There are impairments when the patient is experiencing the manic or hypomanic, depressed, and euthymic (remission) stages of the illness. In other words, patients are impaired in bipolar disorder independent of clinical state.⁴⁸ In euthymic patients, subtle impairments in attention and memory suggest that an absence of symptoms does not necessarily equate to "recovery."⁴⁹

37. A part of the criteria for diagnosis of a manic episode is:

The mood disturbance is sufficiently severe to cause marked impairment in occupational functioning or in usual social activities or relationships with others, or to necessitate hospitalization to prevent harm to self or others, or there are psychotic features.⁵⁰

38. To get the diagnosis of Bipolar I the Appellant had to have significant problems with adaptive functioning. It is not possible to have a diagnosis of bipolar disorder without

⁴⁶ TS is Tourette's Syndrome, PDD is Pervasive Development Disorder, OCD is Obsessive Compulsive Disorder, ADHD is Attention Deficit Hyperactivity Disorder, AD is Asperger's Disorder, NOS is not otherwise specified, AD is Anxiety Disorder, MD is Major Depression, ODD is Oppositional Defiant Disorder, BPD is Bipolar Disorder.

⁴⁷ Ex. 44.

⁴⁸ Ex. 45.

⁴⁹ Ex. 46.

⁵⁰ Ex. 39, final page.

having deficits in adaptive functioning. The Appellant has Bipolar I disorder with psychotic features, which is the most severe form of bipolar disorder.

39. [DOCTOR 1]'s evaluation is not useful to the finder of fact, and has been given very little weight. Her conclusions are not credible.⁵¹

40. Based on the testimony of Dr. McConnachie, this order finds that the Appellant's mental illness is the primary cause of his substantial functional deficits.

III. CONCLUSIONS OF LAW

1. The petition for review was timely filed and is otherwise proper.⁵² Jurisdiction exists to review the Initial Order and to enter the final agency order.⁵³

2. ALJs and Review Judges must first apply the Department of Social and Health Services (DSHS) rules adopted in the Washington Administrative Code (WAC). If no DSHS rule applies, the ALJ or Review Judge must decide the issue according to the best legal authority and reasoning available, including federal and Washington State constitutions, statutes, regulations, and court decisions.⁵⁴

3. In an adjudicative proceeding involving eligibility for DDD services, the undersigned Review Judge has the same decision-making authority as the ALJ to decide and enter the *Final Order*, in the same way as if the undersigned had presided over the hearing.⁵⁵ This authority includes entering Findings of Fact and Conclusions of Law, and resolving the issues presented in the case. The undersigned reviewing officer does not have the same relationship to the presiding officer as an Appellant Court Judge has to a Trial Court Judge; and the case law addressing that judicial relationship does not apply in the administrative hearings forum.

⁵¹ As the ALJ noted in footnote 6 to the Initial Order: "In that regard, however, it is noted that [DOCTOR 1]'s stated opinion that the Appellant's 'current adaptive functioning' [whether in 2005 or 2008] was not the result of the Appellant's mental illness is, at best, difficult to comprehend."

⁵² WAC 388-02-0560 through -0585.

⁵³ WAC 388-02-0215, -0530(2), and -0570.

⁵⁴ WAC 388-02-0220.

⁵⁵ WAC 388-02-0600(2)(a), RCW 34.05.464(4).

4. The Washington Administrative Procedure Act directs Review Judges to personally consider the entire hearing record.⁵⁶ Consequently, the undersigned has considered the adequacy, appropriateness, and legal correctness of all initial Findings of Facts and Conclusions of Law, regardless of whether any party has asked that they be reviewed. Because the ALJ is directed to decide the issues de novo (as new), the undersigned has also decided the issues de novo. The undersigned has given due regard to the ALJ's opportunity to observe the witnesses, but has otherwise independently decided the case.

5. The ALJ had jurisdiction to hear and determine the issue of whether the Department had correctly evaluated the Appellant's eligibility for DDD services.⁵⁷ All exhibits and testimony offered by the parties and admitted by the ALJ are also considered by the undersigned review judge.

DDD Eligibility Determination

6. The Appellant's request for DDD services was subject to eligibility review under WAC 388-823-1010. This rule provides that DDD will review eligibility to determine whether an applicant the Appellant's age (over eighteen years) continues to have a disability whenever he is not currently receiving benefits and his most current eligibility determination is more than twenty-four months old.

7. As an applicant for services, the Appellant has the responsibility to obtain all of the information needed to document his disability or to provide DDD with the sources for obtaining the documentation.⁵⁸ DDD will assist the Appellant in obtaining the information he needs if he needs help, but the ultimate responsibility to provide necessary documentation is the Appellant's. And once the Appellant moved into the administrative hearings forum, he also has the legal burden of proof. He must prove that he is eligible for services.⁵⁹

⁵⁶ RCW 34.05.464(5).

⁵⁷ RCW 74.08.080, chapter 34.12 RCW, WAC 388-832-0470, and chapter 388-02 WAC.

⁵⁸ WAC 388-823-0110.

⁵⁹ *Newbury v. State Dept. of Public Assistance*, 80 Wn.2d 13, 491 P.2d 235 (1971).

8. An individual is eligible for enrollment as a DDD client if DDD determines that individual to have a “developmental disability.”⁶⁰ WAC 388-823-0040(1)(a), (b), (c), and (d) contain the four substantive requirements the Appellant must meet in order to be eligible for DDD services. Each one of these requirements, in turn, has its own regulations that further refine these criteria.

8. WAC 388-823-0040(1) states:

What is a developmental disability?

(1) A developmental disability is defined in RCW 71A.10.020(3) and must meet all of the following requirements. The developmental disability must currently:

(a) Be attributable to mental retardation, cerebral palsy, epilepsy, autism, or another neurological or other condition found by DDD to be closely related to mental retardation or requiring treatment similar to that required for individuals with mental retardation;

(b) Originate prior to age eighteen;

(c) Be expected to continue indefinitely; and

(d) Result in substantial limitations to an individual's adaptive functioning.

10. Chapter 388-823 WAC contains the Department's rules regarding DDD eligibility. WAC 388-823-0040(1)(a) lists six possible categories. Each of these categories contains detailed, specific requirements for eligibility. In order to qualify for DDD services, the person requesting DDD services must prove that he meets all of the eligibility criteria for a particular category. In this case, the Appellant only alleges that he qualifies for services under the category of “autism.” The Initial Order examined this allegation and concluded that the Appellant did not meet the specific criteria listed in the eligibility rules. The undersigned will also examine this same category in order to determine whether the Initial Order correctly determined the Appellant as ineligible for DDD services.

⁶⁰ WAC 388-823-0020.

11. Eligibility for DDD services under the category of “autism” requires a diagnosis by a qualified professional of autism or autistic disorder part 299.00 in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) that is expected to continue indefinitely, and evidence of onset before age three. The following professionals are qualified to give this diagnosis:

- (a) Board eligible neurologist;
- (b) Board eligible psychiatrist;
- (c) Licensed psychologist; or
- (d) Board certified developmental and behavioral pediatrician.

Additionally, the evidence provided by the diagnosing professional must include a total of six or more of the diagnostic criteria listed in the current DSM-IV-TR for Autistic Disorder 299.00.

Finally, the client must demonstrate evidence of substantial limitations of adaptive functioning which include evidence of delay or abnormal functioning prior to age three.⁶¹ In this matter, the ALJ correctly concluded that the Appellant had demonstrated all of the outlined requirements to be determined eligible under the category of “autism,” except for evidence of substantial limitations of adaptive functioning.

The Appellant’s Vineland Results

12. In order to substantiate adaptive functioning limitations for “autism”, the client must provide a qualifying score completed in the past thirty-six months on the Vineland Adaptive Behavior Scales (Vineland) or Scales of Independent Behavior-Revised (SIB-R) assessments, or a qualifying score completed in the past twenty-four months on an Inventory for Client and Agency Planning (ICAP). A qualifying score for Vineland equals an adaptive behavior composite score of 69 or less.⁶² If DDD is unable to determine that the applicant’s current adaptive functioning impairment is the result of a developmental disability because he has an unrelated injury or illness that is impairing their current adaptive functioning, they will not accept

⁶¹ WAC 388-823-0500, -0510, and -0515.

⁶² WAC 388-823-0420(1).

the results of a VABS or SIB-R administered after diagnosis of the unrelated injury or illness, and will not administer the ICAP.⁶³

13. The Appellant challenges the ALJ's conclusion that his Vineland results cannot be accepted by DDD because DDD has determined that the Appellant has an unrelated illness which impairs his current adaptive functioning. The Appellant's Vineland score is rejected in this order for three reasons.

14. First, the results are not current. Even if they were considered valid, the results are those for an earlier period, not for the period on July 2008.

15. Second, the Appellant did not provide a Vineland score from a test conducted following the Vineland test administration rules. Other than brief periods of incarceration, the Appellant was continuously institutionalized at [FACILITY 1] from May 2006 until July 2008. The Vineland administered in July 2008 was based on the recollections of the Appellant's [RELATIVES] and past caregivers from 2005. They could not provide [DOCTOR 1] with any current information about the Appellant's functioning. The test results did not take into account the Appellant's significant mental illness. The test was not conducted by questioning the individual person having the most current knowledge of the Appellant's day-to-day behavior. The test was based on recollections that were two and one-half to three years old. [DOCTOR 1] did not testify, and there was no opportunity to cross-examine her regarding these concerns. The test results were not valid. Therefore, the Appellant did not offer a valid Vineland test result for the DDD to consider.

16. Third, pursuant to WAC 388-823-0420(2),⁶⁴ when DDD is unable to determine that the client's current adaptive functioning impairment is the result of autism, because the

⁶³ WAC 388-823-0420(2).

⁶⁴ (2) If DDD is unable to determine that your current adaptive functioning impairment is the result of your developmental disability because you have an unrelated injury or illness that is impairing your current adaptive functioning:

(a) DDD will not accept the results of a VABS or SIB-R administered after that event and will not administer the ICAP; and

person has an unrelated injury or illness that is impairing their current adaptive functioning, DDD will not accept the results of a Vineland or SIB-R administered after diagnosis of the unrelated injury or illness, and will not administer the ICAP. The Appellant has had unrelated mental illness diagnoses since the age of seven, in approximately 1990. Bipolar I disorder by definition involves impairments to an individual's adaptive functioning. A person must be diagnosed with a manic episode in order to be diagnosed with Bipolar I. The Appellant's need for hospitalization and psychosis reflect serious deficits in adaptive functioning. Therefore, the Department was correct in not accepting the results of the Appellant's July 23, 2008, Vineland assessment, and until the Appellant can demonstrate a qualifying Vineland, SIB-R or ICAP score unaffected by an unrelated injury or illness, he cannot be found eligible for DDD services under the category of "autism."

Alleged Illegal Rulemaking

17. The Appellant claims that the Department has illegally engaged in rulemaking, because it interprets its rules to require that a dually diagnosed applicant for DDD services be "cured" of the non-qualifying illness before it can measure deficits in adaptive functioning. DDD eligibility under the category of autism requires that current adaptive functioning deficits must be attributable to autism, and not to mental illness. As established by the testimony of Dr. McConnachie, the Appellant's mental illness was affecting his adaptive functioning in July 2008. The Appellant's functioning was not only effected during the manic or depressive phases of his Bipolar disorder, but also during the euthymic phases. During the euthymic phases, the Appellant's adaptive functioning greatly improved, but it was still affected. Thus, any measure of his adaptive functioning would be lower than it would be absent the Bipolar I disorder. Although the Department's witnesses may have used the word "cured" to describe the difference between the euthymic phase of Bipolar and the absence of Bipolar disorder, their

(b) Your eligibility will have to be determined under a different condition that does not require evidence of adaptive functioning per a VABS, SIB-R or ICAP.

application of the Department's rules was correct. No "unadopted" rule or policy was applied to the Appellant's application.

18. In sum, the Appellant has Bipolar I disorder and Attention Deficit Hyperactivity disorder, and did at the time of the adaptive functioning testing that the Appellant has offered. Those mental illnesses do (by definition and in fact) cause adaptive functioning deficits unrelated to the Appellant's autism. The Appellant has the burden of proving that he is eligible for DDD services under the "autism" category and he has failed to provide the requisite evidence of adaptive functioning limitations necessary to meet that burden. Nobody can determine what, if any, functional impairments the Appellant has as a result of his autism alone; under WAC 388-823-0420(2), the DDD is barred from attempting that impossible task. The Department correctly denied the Appellant's request for DDD services.

19. The Appellant has not proven that he is eligible for DDD services under the Department's DDD eligibility rules.

20. The undersigned has considered the Initial Decision, the Appellant's Petition for Review, the Department's Response, and the entire hearing record. The initial Findings of Fact that were supported by substantial evidence in the record are adopted as findings in this decision. Any arguments in the Petition for Review that are not specifically addressed have been duly considered, but are found to have no merit, or to not substantially affect a party's rights. The procedures and time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

[INTENTIONALLY LEFT BLANK]

IV. DECISION AND ORDER

The Initial Order is affirmed. The Department decision is affirmed. The termination of Division of Developmental Disabilities Eligibility and Benefits to Appellant [APPELLANT'S NAME] effective January 6, 2009, is affirmed.

Mailed on July 27th, 2010.

MARJORIE R. GRAY
Review Judge

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: [APPELLANT'S NAME], Appellant
Jonathan D. Bashford, AAG, Department Representative
Alberto Casas, Appellant Representative
[NAME 1], Appellant Representative
Shannon Manion, Program Administrator
Christopher Osborn, Other
Bruce Work, AAG, Program Administrator