

STATE OF FLORIDA
AGENCY FOR PERSONS WITH DISABILITIES

[REDACTED],

Petitioner,

v. DOAH
APD

Case No.: 08-5234APD
Rendition: APD-09-5963-FO

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

/

FINAL ORDER

This case is before the Agency for Persons with Disabilities for consideration of a Recommended Order issued by presiding Administrative Law Judge (ALJ) Diane Cleavinger on February 16, 2009, following a hearing before the Division of Administrative Hearings on December 2, 2008. Petitioner requested the hearing to dispute proposed Agency action to deny eligibility to enroll in the Developmental Disability Home and Community-Based Services (HCBS) or Supported Living (FSL) Waiver Programs. The Petitioner was represented by a Qualified Representative, [REDACTED], and the Agency represented by Tom Barnhart, Esquire, Office of the Attorney General. Both Respondent and Petitioner submitted Proposed Recommended Orders. The Petitioner submitted exceptions to the Recommended Order which have been duly considered in issuing the Final Order. A transcript was not filed. The ALJ recommended that the Agency enter a Final Order denying Petitioner's

application for enrollment in, and services from, the Home and Community-Based Waiver or Family and Supported Living Waiver Programs.

EXCEPTIONS

Section 120.57(1)(k), Florida Statutes, provides that a Final Order shall include an explicit ruling on each exception filed with the Agency but that the Agency need not rule on an exception “that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.” Financial Marketing Group, Inc. v. Department of Banking & Finance, Division of Securities, 352 So. 2d 524 (Fla. 3d DCA 1977).

The transcript of the administrative hearing was not filed with the Division for the Administrative Law Judge to consider in preparation of the Recommended Order. The Exceptions filed by the Qualified Representative do not comport with the statutory requirements for filing Exceptions because they do not clearly identify the disputed portion of the Recommended Order by page number or paragraph, they do not identify the legal basis for the Exceptions, and they do not include appropriate and specific citations to the record, including the transcript.

However, the Agency thoroughly reviewed the Exceptions filed by the Qualified Representative and the record of the administrative proceeding. It appears that the primary contention raised in the Exceptions is that in determining [REDACTED]’s eligibility for the HCBS or FSL Waiver Program, the Agency failed to follow APD policy because; 1) APD ‘s examining psychologist, Dr. Prichard, failed to screen [REDACTED] for prior head injuries; 2) APD and the case review

specialist, Dr. Wan Amad, PhD., both ignored Dr. Prichard's original recommendation that additional diagnostic testing be done on [REDACTED] and 3) that collateral information (witness testimony) was not properly reviewed by APD.

FINDINGS OF FACT:

Exception #1. Screening for prior head injuries:

There is no corroborating evidence of a prior head injury contained in any of the exhibits submitted into evidence by the parties. The only evidence of a prior head injury are the statements made by [REDACTED] in interviews during the application process. Petitioner's Exhibit "1", the statement of [REDACTED] makes no reference to a prior head injury which may have caused the onset of mental retardation before the age of 18 years old. Neither of the three "Supporting Witness Testimony" statements makes any affirmative declaration of personal knowledge of a prior head injury of [REDACTED]. Dr. Prichard's Psychological Evaluation states clearly that [REDACTED] s "history appears to reflect fully independent functioning for the majority of [REDACTED] adult life." The Administrative Law Judge made no Findings of Fact that [REDACTED] incurred a head injury earlier in life, much less that it caused the onset of mental retardation. Rather, the ALJ made stated in Finding of Fact #5 that:

The interviews (by Dr. Prichard) revealed that in the past, [REDACTED] successfully took care [REDACTED], paid [REDACTED] bills, maintained [REDACTED] household and raised [REDACTED] [REDACTED]. The historical description of [REDACTED] s accomplishments during [REDACTED] life, demonstrate that [REDACTED] had adaptive skills in the average range. Such successful adaptive skills preclude the finding of mental retardation relative to [REDACTED]

Exception #1 is rejected.

Exception #2. APD ignored Dr. Prichard's recommendation that additional diagnostic testing be done:

The only reference found in Dr. Prichard's Psychological Evaluation dated June 5, 2008, referring to "further diagnostic testing" is the statement "This will simply have to be further assessed by a medical doctor or a neurologist." This statement immediately follows a discussion by Dr. Prichard of conducting the "Rule Out Diagnosis of Dementia" testing for an Axis I diagnosis. Whether or not [REDACTED] is experiencing "aged related decline in memory" or "early stages of dementia" was the subject that "will have to be further assessed by a medical doctor or a neurologist", not a diagnosis of mental retardation.

Exception #2 is rejected.

Exception #3. Collateral information, "witness testimony" not properly reviewed:

APD Operating Procedure APD 04-007, Section 12; Categories of Eligibility and Eligibility Determination. 12. b. v., Adults with no verified diagnosis of retardation before the age of 18: provides the guidelines for reviewing "collateral information" to establish the onset of mental retardation before the age of 18 in the absence of diagnostic testing or school records from high school or earlier. In accordance with APD OP 04-007, [REDACTED] submitted three "Supporting Witness Testimony" statements. As noted above in the response to Exception #1, neither of the three "Supporting Witness Testimony" statements makes any affirmative declaration of personal knowledge of a prior head injury of [REDACTED] or of the existence of a diagnosis of mental retardation prior to the age of 18. No other reference to "collateral information" is contained in the record.

Exception #3 is rejected.

The recommended Findings of Fact are approved and adopted and incorporated herein as the Agency's Findings of Fact.

CONCLUSIONS OF LAW:

1. The Agency has jurisdiction over this matter pursuant to the provisions of § 120.57 and Chapter 393, Florida Statutes.
2. Section 20.197(3), Florida Statutes, empowers the Agency to provide all services to persons with developmental disabilities under Chapter 393, Florida Statutes, as well as "the programmatic management of Medicaid waivers established to provide services to persons with developmental disabilities."
3. Petitioner applied for enrollment in the Home and Community-Based Waiver and Family or Supported Living Waiver Service Programs from the Agency for Persons with Disabilities. APD denied the request for eligibility for enrollment finding Petitioner did not meet the statutory definition for a diagnosis of mental retardation.
4. As the applicant seeking a determination of eligibility for Waiver Services, Petitioner had the burden of proving by a preponderance of evidence that [REDACTED] is entitled to enrollment in the HCBS or FSL Waiver Services Program. A preponderance of the evidence means the greater weight of the evidence. See Fireman's Fund Indemnity Co. v. Perry, 5 So. 2d 862 (Fla. 1942).
5. Section 120.569 and 120.57(1), Florida Statutes, empowers the ALJ to conduct a de novo hearing to determine the eligibility of Petitioner for the requested services program. "The general rule is that as in court proceedings,

the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before the administrative tribunal.” Balino v. Department of Health & Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977). Department of Transportation v. J.W.C., 396 So. 2d 778 (Fla. 1st DCA 1981).

6. The underlying purpose of the Developmental Disabilities Waiver Program is to provide such services as are necessary to avoid institutionalization of the individual. 42 C.F.R § 441.300. Florida law requires the Agency to administer a program of community-based services and treatment of persons with developmental disabilities to allow them to live as independently as possible in their homes or communities. § 393.066(1), F.S.

7. It is the Administrative Law Judge’s duty to consider all the evidence presented, resolve conflicts, judge the credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence. Heifetz v. Department of Business Regulation, 474 So. 2d 1277 (Fla. 1st DCA 1985); Wills v. Florida Elections Com’n, 955 So. 2d 61 (Fla. 1st DCA 2007).

8. To make a finding of fact is to set out the facts which an ALJ found from the evidence and testimony to be true. Laney v. Holbrook, 8 So. 2d 465 (Fla. 1945). A finding of fact is presumed correct. An agency may only reject a finding of fact if, after a complete review of the record and transcript, it determines that there is no competent substantial evidence for support. Gruman v. Department of Revenue, 379 So. 2d 1313 (Fla. 1st DCA 1980).

9. The Agency is not authorized to weigh the evidence presented, or judge the credibility of witnesses. McDonald v. Department of Banking & Finance, 346 So. 2d 569 (Fla. 1st DCA 1977); Gross v. Department of Health, 819 So. 2d 997 (Fla. 5th DCA 2002). An agency need not respond to exceptions regarding findings of fact without first being provided a record and transcript of the hearing. Financial Marketing Group, Inc. v. Department of Banking & Finance, 353 So. 2d 534 (Fla. 3d DCA 1977).

10. The ALJ's determination that a party has carried its burden of proof is the equivalent of a finding of fact and may not be overturned by an agency if there is some evidence in the record to support this conclusion. Heifetz v. Department of Business Regulation, 474 So. 2d 1277 (Fla. 1st DCA 1985).

11 The ALJ weighed the evidence in the form of the testimony of Petitioner and Petitioner's Exhibit #1as well as the testimony the Agency's two witnesses and Respondent's Exhibits #1 and 2. The Findings of Fact support the Conclusions of Law, that Petitioner did not meet the burden of proving by a preponderance of the evidence that [REDACTED] met the statutory criteria for a diagnosis of mental retardation for enrollment in the HCBS or FSL Waiver Service Programs.

14. The recommended Conclusions of Law are approved and adopted and incorporated herein as the Agency's Conclusions of Law.

Upon consideration of this case, the Recommended Order, attached hereto as Exhibit "A", and the Exceptions filed by Petitioner, it is hereby ORDERED AND ADJUDGED:

1. The recommended Findings of Fact and Conclusions of Law are adopted in full;
2. The request for enrollment in the HCBS or FSL Waiver is DENIED; and
3. This Final Order will become effective on the date of filing with the Agency Clerk.

DONE AND ORDERED this _____ day of _____, 2008.

Mac McCoy, Operations Officer
Agency for Persons with Disabilities

NOTICE OF RIGHT TO APPEAL

Unless expressly waived, any party adversely affected by this Final Order may seek judicial review by filing an original Notice of Appeal with the Agency Clerk and a copy of the Notice of Appeal, accompanied with the filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal within 30 days of the rendition¹ of this order, in accordance with Rule 9.110, Florida Rules of Appellate Procedure, and Section 120.68, Florida Statutes.

¹ The date of rendition of this Final Order is the date stamped on its first page. The Notice of Appeal must be received on or before the thirtieth day after that date.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of this Final Order has been provided by U.S. Mail to [REDACTED] s Qualified Representative, [REDACTED]
[REDACTED], this _____ day of _____,
2009.

Percy

W. Mallison, Jr., Agency Clerk
Agency for Persons with Disabilities

Copies of the Final Order also have been furnished to:

Tom Barnhart, Esquire,
Office of the Attorney General

Claudia Llado, Clerk
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