

STATE OF FLORIDA
AGENCY FOR PERSONS WITH DISABILITIES

Case NO. 08-6337APD
RENDITION No. APD-09-____-FO

██████████

Petitioner,

v.

AGENCY FOR PERSONS WITH DISABILITIES

Respondent.

_____ /

FINAL ORDER

THIS CAUSE is before the Agency for Persons with Disabilities for consideration and final agency action concerning Petitioner's eligibility for services from the Agency for Persons with Disabilities. Following a final hearing before the Division of Administrative Hearings on March 24, 2009, in ██████████ Florida, Administrative Law Judge Suzanne F. Hood issued a Recommended Order concluding that Petitioner does not meet the criteria for enrollment in the Developmental Disabilities Home and Community-Based Services Waiver program. (DD Waiver) A transcript of the administrative proceeding was filed with the Division. Both parties timely submitted Proposed Recommended Orders. Petitioner filed Exceptions to the Recommended Order. Respondent filed a Response to Petitioner's Exceptions to Recommended Order. The Recommended Order's Findings of Fact and Conclusions of Law are approved and adopted.

EXCEPTIONS

1. ██████ made an application with APD for services through the DD Waiver program under APD's Developmental Disabilities Waiver Program for a determination of eligibility.

2. The Agency notified ██████ that the application failed to demonstrate that ██████ met the criteria for the developmental disability, autism, as defined by Section 393.063(3), or mental retardation under Section 393.063(9), Fla. Stat.

3. Petitioner filed Exceptions to the Recommended Order. Specifically, Exceptions to Finding of Facts (FOF) number's 5, 9, 11, 14, 15, 16, and 17, and to Conclusions of Law (COL) numbers 24 and 25.

4. Rule 28-106.217, F.A.C.; *Exceptions and Response*: states in pertinent part:

Exceptions shall identify the disputed portion of the recommended order by page number and paragraph, shall identify the legal basis for the exception, and shall include any specific citations to the record.

5. Exception to Finding of Fact #5. Petitioner's Exception to Finding of fact #5 argues that he meets the statutory definition for autism. Section 393.063(3), Fla. Stat. defines autism:

"Autism" means a pervasive, neurologically based developmental disability of extended duration which causes severe learning, communication, and behavior disorders with age of onset during infancy or childhood. Individuals with autism exhibit impairment in reciprocal social interaction, impairment in verbal and nonverbal communication and imaginative ability, and a markedly restricted repertoire of activities and interests.

Petitioner's reliance on Dr. Ahmad's testimony for confirmation that autism or autistic disorder is included under the more general diagnosis of "pervasive developmental

disorders” is not supported by the transcript citation. Dr. Ahmad merely identified Section 299.00 *Autistic Disorder* of the Diagnostic and Statistical Manual IV (DSM IV), Exhibit “10”. Dr. Ahmad testified consistently that [REDACTED] did not meet the statutory definition for autism as defined in Section 393.063(3), Fla. Stat. [Transcript pp. 105-107]. Dr. Ahmad testified that [REDACTED] did not have a learning disorder [Transcript pp. 109-110], nor did [REDACTED] have a learning disability [Transcript p. 111] Dr. Ahmad reviewed both Dr. Klein’s and Dr. Jennings’ evaluations and did not find any indication in either report that [REDACTED] met the statutory definition of autism. [Transcript p. 112] Dr. Jennings evaluation indicated that [REDACTED] had good communication skills. [Transcript p. 114] Exception to FOF #5 is rejected.

6. Exception to FOF #9. Petitioner takes exception to the find that “there is no persuasive evidence that Petitioner has a severe learning disorder.” Dr. Ahmad testified that [REDACTED] did not have a learning disorder [Transcript pp. 109-110], nor did [REDACTED] have a learning disability. [Transcript p. 111] Exception to FOF #9 is rejected.

7. Exception to FOF #11. Petitioner takes exception to the finding that “Petitioner’s communication problems are not so severe as to prevent him from being able to provide information to make requests verbally.” Two of the Petitioner’s witnesses testified about [REDACTED]’s communication skills. Dr. Klein testified that [REDACTED] can communicate and provide factual information. [Transcript p. 64] Dr. Jennings’ evaluation indicated that [REDACTED] had good communication skills. [Transcript p. 114] Exception to FOF # 1 is rejected.

8. Exception to FOF #14. Petitioner does not state an exception to this finding, but merely points out that “This Finding of Fact does not make any findings as to whether Petitioner displays any of these characteristic behaviors [for autism]. FOF #14 stated that Petitioner has severe behavioral problems that are not typically associated with autism. The Administrative Law Judge did not make a finding that [REDACTED] had characteristic behaviors of a person with autistic disorder.

Exception to FOF #14 is rejected.

9. Exception to FOF #15. Petitioner argues that the finding that “Petitioner has a restricted repertoire of activities and interests” alone is sufficient to meet the statutory definition of autism. Dr. Ahmad testified consistently that [REDACTED] did not meet the statutory definition for autism as defined in Section 393.063(3), Fla. Stat. [Transcript pp. 105-107]. Dr. Ahmad reviewed both Dr. Klein’s and Dr. Jennings’ evaluations and did not find any indication in either report that [REDACTED]. met the statutory definition of autism.

[Transcript p. 112]

Exception to FOF #15 is rejected.

10. Exception to FOF #16. Petitioner takes exception to the finding that “Autism and Asperger’s Syndrome are two distinct diagnoses.” The testimony by Dr. Ahmad supports this finding. [Transcript pp. 106 -107] Petitioner takes exception to the ALJ’s reliance on Exhibit “10”, the Diagnostic and Statistical Manual IV. (DSM IV) Dr. Ahmad’s testimony also supports the finding that “Asperger’s Disorder can be distinguished from Autistic Disorder by lack of delay or deviance in early childhood language development. Asperger’s Disorder is not diagnosed if criteria are met for Autistic Disorder. [Transcript p. 106] [Exhibit “10”, p. 74] The ALJ did not rely solely on

the DSM IV to find that █████ did not meet the statutory criteria for autism. The ALJ found Dr. Ahmad's testimony on this issue credible. Dr. Ahmad specifically testified that: "Asperger's Disorder is not diagnosed if the criteria are met for autistic disorder. So, they are mutually exclusive." [Transcript p. 107]

Exception to FOF #16 is rejected.

11. Exception to FOF #17. Petitioner takes exception to FOF #17 due to the ALJ's reliance on the DSM IV at pp. 74 and 75, that "the diagnostic criteria for autistic disorder includes a finding of 'qualitative impairment in communication.'" Dr. Ahmad's testimony supports this finding and is consistent with the statements in the DSM IV. [Transcript p. 107.] Petitioner also takes exception to the ALJ's reliance on the diagnostic criteria for Asperger's Disorder in the DSM IV at page 84 "as including a finding that there is no clinically significant general delay in language . . ." Dr. Ahmad's testimony describing the difference between Asperger's Syndrome and Autistic Disorder specifically addresses the lack of delay in language development between Autistic Disorder versus Asperger's Syndrome. [Transcript pp. 106-107]

Exception to FOF #17 is rejected.

12. Petitioner takes issue with the ALJ's judgment in weighing the credibility of the evidence, witness testimony and exhibits entered into evidence. Petitioner is disputing the ALJ's application of the law to the evidence. The ALJ accepted Dr. Ahmad's testimony that █████. did not meet the statutory definition of autism based on his own professional experience, a review of all the pertinent records of █████ admitted into evidence, including Dr. Klein and Dr. Jennings evaluation reports, the school and medical records. [Transcript pp. 105 and 127]

13. The ALJ performed a thorough review and analysis of all the medical and psychological evaluations presented and the educational history provided for [REDACTED]. It is the ALJ's duty, not that of the Agency, to weigh the evidence presented and judge the credibility of witnesses.

14. The Agency adopts the recommended Findings of Fact as the Agency's Findings of Fact.

CONCLUSIONS OF LAW

15. Exception to Conclusion of Law (COL) #24. Petitioner presents the same argument in taking exception to COL #24 that was made to FOF #16 and 17, that a diagnosis of Asperger's Syndrome does not preclude a diagnosis of Autistic Disorder. To the contrary, Dr. Ahmad testified that they are two distinct disorders, and the characteristics of Asperger's Syndrome do not meet the statutory criteria for autism under Section 393.063(3), Fla. Stat. See discussion for FOF #16 and #17 above. There is no testimony in the record by Dr. Klein or Dr. Jennings that [REDACTED] meets the statutory definition of autism. However, Dr. Ahmad testified that [REDACTED] does not meet the statutory criteria of §393.063(3), Fla. Stat. [Transcript pp. 106-107] Further, there is no legal support cited by Petitioner for the statement that: "The two disorders are separate diagnoses under DSM IV, an improper and irrelevant test under Chapter 393, Florida Statutes." The statute provides the criteria that an individual must meet for eligibility for enrollment in the Waiver under the category for autism. The ALJ made specific findings of fact based on competent testimony of Dr. Ahmad and in weighing the testimony of both Dr. Klein and Dr. Jennings, and found that [REDACTED] did not meet the statutory criteria for autism.

Exception to COL # 24 is rejected.

16. Petitioner files exception to COL #25 wherein the ALJ addressed issues raised by the Petitioner that were not properly before the Division at the time of the final hearing, therefore were not considered in the Recommended Order. First, that the Agency had not promulgated rules to clarify the statutory definition of autism. Second, that the DSM IV was not published until 1994 and was not available when Section 393.063(3), Fla. Stat., (1989), was enacted. Neither conclusion impacts the finding that ██████ does not meet the statutory criteria for autism. In L.C. v. APD, DOAH Case No.: 07-2877, Recommended Order July 1, 2008, the ALJ did not rely on the testimony of Dr. Garcon that concluded that ██████ was mentally retarded (MR) because ██████ met the criteria of MR pursuant to DSM IV. The ALJ's decision was based on the conclusion that the statutory criteria for mental retardation did not contain any reference to DSM IV nor was DSM IV a rule promulgated by APD relating to Section 393.063, Fla. Stat. (FOF #26 of the Recommended Order in the L.C. v. APD case. In the ██████ case, the ALJ relied on the testimony of Dr. Arias that "██████ 'scores do not suggest mental retardation.'" (FOF #18 of the Recommended Order in L.C. v. APD) In the ██████ case, as in the instant case, the parties agreed that ██████ must meet the statutory criteria set forth in Section 393.063, Fla. Stat., in particular, Section 393.063(3), Fla. Stat. The ALJ in the instant case made findings based on the credible testimony of Dr. Ahmad that: "The evidence fails to establish that Petitioner has autism or a developmental disability as defined in Sections 393.063(3) and 393.063(9), Florida Statutes (2008)." (COL #24 in Recommended Order of ██████'s case)

Exception to COL #25 is rejected.

16. The Agency has jurisdiction over this matter pursuant to the provisions of § 120.57 and Chapter 393, Fla. Stat.

17. Further, § 20.197(3), Fla. Stat., empowers the Agency to provide all services to persons with developmental disabilities under Chapter 393, Fla. Stat., as well as “the programmatic management of Medicaid waivers established to provide services to persons with developmental disabilities.”

18. Petitioner is requesting a determination of eligibility for the DD Waiver Program, and as such, is asserting the affirmative in this proceeding. The general rule is that the “burden of proof, apart from statute, is on the party asserting the affirmative of an issue at the administrative proceeding.” Balino v. Department of Health & Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977), Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

19. ■■■■ bears the ultimate burden of proving his eligibility for DD Waiver services by meeting the criteria set forth in Section 393.065(3), Fla. Stat., by a preponderance of the evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996), Antel v. Department of Professional Regulation, Florida Real Estate Commission, 522 So. 2d 1056, 1058 (Fla. 5th DCA 1988). 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).

20. The underlying purpose of the DD 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 Respondent 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), Fla.Stat.

21. Section 120.57(1)(k), Fla. Stat., provides that a final order shall include an explicit ruling on each exception but that an 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 administrative hearing was not transcribed.

22. 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).

23. 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).

24. 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).

25. The ALJ weighed the evidence of the parties, including the numerous medical and psychological evaluations performed on ■■■■■, as well as the school reports and assessments. The ALJ's determination that a party has not 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). Petitioner has failed to carry the burden to establish ■■■■■ meets the statutory criteria for autism.

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

Accordingly, upon review of the complete record in this case, including the Proposed Recommended Orders of the parties, the Recommended Order, Petitioner's Exceptions, the submissions and arguments of the parties, and being otherwise fully advised in the premises, Petitioner's request for eligibility for services from the Agency for Persons with Disabilities is hereby DENIED. The denial is without prejudice for Petitioner to resubmit the application for Developmental Disabilities Home and Community-Based Waiver program.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this _____ day of August, 2009.

Mac McCoy, Officer Operations
Agency for Persons with Disabilities

RIGHT TO APPEAL

A party who is adversely affected by this final order is entitled to judicial review. To initiate judicial review, the party seeking it must file one copy of a "Notice of Appeal" with the Agency Clerk. The party seeking judicial review must also file another copy of the "Notice of Appeal," accompanied by the filing fee required by law, with the First District Court of Appeal in Tallahassee, Florida, or with the District Court of Appeal in the district where the party resides. Review proceedings shall be conducted in accordance with Florida Rules of Appellate Procedure. The Notices must be filed within thirty (30) days of the rendition of this final order.¹

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Final Order was provided to the above-named individuals at the listed addresses, by U.S. Mail, this _____ day of August, 2009.

Percy W. Mallison, Jr., Agency Clerk
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