

STATE OF FLORIDA
AGENCY FOR PERSONS WITH DISABILITIES

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DOAH Case NO.: 08-6345-APD
RENDITION No. : APD-09-7097-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 determining the correct Tier Waiver assignment for Petitioner, ■, pursuant to Section 393.0661, Florida Statutes (2008), and Rules 65G-4.0021 through 65G-4.0025, Florida Administrative Code. The 2007 Legislature created the four tier waiver system and directed the Agency to assign all clients receiving services through the developmental disability waiver to one of four tiers. See Chapter 2007-64, Laws of Florida.

■ disagreed with the Agency's proposed assignment of ■ to Tier Three and timely requested a formal administrative hearing pursuant to the provisions of Section 120.57(1), Florida Statutes (2008). The Agency forwarded the request to the Division of Administrative Hearings for an administrative hearing. Administrative Law Judge Suzanne F. Hood (ALJ) conducted the hearing on February 25, 2009. After a de novo hearing, the Administrative Law Judge issued a Recommended Order recommending that the Agency assign ■ to the Tier Three Waiver.

ALJ Hood provided the Agency with the record of the proceeding, including a transcript. Petitioner filed Exceptions to the Recommended Order in which he urged the Agency to reject and modify the ALJ's Findings of Fact in paragraphs 15, 28, 29, 31, 32, 33, 37, 39 and 42 as well as the ALJ's Conclusions of Law in paragraphs 47, 54, 55, 57 and 59.

After considering the Exceptions, the Recommended Order, and the complete record, the Agency finds the following:

STATEMENT OF THE ISSUE

The issue before the Agency is to which tier Petitioner should be assigned. As discussed in Florida Department of Transportation v. J.W.C. Company, 396 So.2d 778 (Fla. 1st DCA 1981), the purpose of a hearing under section 120.57(1) is not to review action previously taken by the agency but to "formulate final agency action." Thus, the hearing is conducted as a de novo proceeding rather than a review of action already taken.

FINDINGS OF FACT

Petitioner asks the Agency to reject and modify nine Findings of Fact made by the ALJ. Section 120.57(1)(k) 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 ALJ considers all the evidence presented, resolves conflicts, judges the credibility of witnesses, draws permissible inferences from the evidence, and reaches 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). 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). However, the agency is not bound by the labels affixed to the findings of fact and conclusions of law. If a conclusion of law is improperly labeled as a finding of fact, the label should be disregarded and the item treated as if it were a conclusion of law. Battaglia Properties, LTD., v. Florida Land and Water Adjudicatory Commission, 629 So.2d 161 (Fla. 5th DCA 1993), citing Kinney v. Department of State, 501 So.2d 129 (Fla. 5th DCA 1987).

1. Petitioner first objects to that portion of paragraph 15 that states:

“Respondent has approved the guidelines as a valid assessment tool to prepare the 2008 support plan.” (Emphasis added)

Petitioner argues that the guidelines (i.e., the Individualized Cost Guidelines or ICG) were not one of several guidelines approved by the Agency as the use of the word “a” implies; but that the guidelines were the only assessment tool approved by the Agency for use in preparing the 2008 support plan. Petitioner

cites the Agency to pages 80-81 of the transcript where, on cross examination, the Agency's witness testified as follows:

"The ICG was the individualized cost guidelines. That was the approved assessment tool used by the waiver support coordinators that describes his functional abilities, his behavioral needs and his physical needs or abilities. And that is part of the information that is used in developing the support plan to show, you know, what level of services or intensity of services he needs." (emphasis added)

Petitioner also cites us to page 81 of the transcript where the discussion about the ICG continued.

"Q What is the valid assessment tool that the statute requires as part of the tier placement?

A At the time the decision was made, the individual cost guidelines –

Q Was the valid assessment tool required by the tiers?

A Yes."

The record supports the finding that the ICG was the valid assessment tool approved by the Agency for the preparation of the 2008 Support Plan and the language in paragraph 15 is hereby amended to reflect that.

2. Petitioner excepts to the Findings of Fact contained in paragraphs 28, 29, and 31. Each of these paragraphs, in addition to paragraph 30, describes the process the Agency went through in making Petitioner's proposed tier assignment. The transcript (pages 16-49) contains lengthy testimony from Respondent's witness that supports the ALJ's findings on these facts.

Petitioner's objection is denied.

3. Petitioner next argues that Finding of Fact paragraph 32 is not supported by competent, substantial evidence. That paragraph states:

"For purposes of Tier assignment, a 'core' or 'trigger' Waiver service is a service that, under the Tier Statute and Tier Rules is capable of

determining the tier to which a client is assigned. In other words, non-core or non-trigger Waiver services have no effect on tier assignment.”

This finding is supported in the record on page 24 of the Transcript where Respondent’s witness was asked to describe what a core or trigger waiver service is for purposes of tier assignment.

“Those are the services that are used to determine which tier level a person is put in. They are specifically noted in statute and rule as a service that we look at to determine which tier a person should be placed in.”

Petitioner’s exception to Finding of Fact paragraph 32 is denied.

4. Petitioner next objects to the Finding of Fact in paragraph 33 that states “Petitioner does not possess any intensive medical or adaptive needs or any intensive behavioral problems that are exceptional in intensity, duration, or frequency.” Petitioner contends that this statement is not supported by competent, substantial evidence in the record. This is, however, the only finding that the record can support since there was no evidence that Petitioner possesses intensive medical or adaptive needs or intensive behavioral problems that are exceptional in intensity, duration, or frequency.

5. Petitioner next takes exception to the Finding of Fact in paragraph 37.

“Tier one assignments require the following: (a) recipients living in a licensed residential facility and receiving special medical home care; (b) recipients living in a licensed residential facility and receiving intensive behavioral residential habilitation services; (c) children and adults receiving behavioral focus residential habilitation services at the moderate or higher level of support; and/or (d) clients living in a licensed residential facility and receiving standard residential habilitation services at the extensive one or higher level of support. Petitioner does not qualify for a Tier One Waiver assignment.”

As Petitioner notes, this is merely a rewording of the language found in Florida Administrative Code Rule 65G-4.0022(2). As such, it is not a finding of fact.

Nevertheless, it would be more accurate to replace paragraph 37 with the following which includes language omitted from the rule:

“Tier one assignments require the following: (a) the client must possess intensive medical or adaptive needs for services that cannot be met in any other tier without which he would be institutionalized; or (b) the client must possess behavioral problems that are exceptional in intensity, duration, or frequency with resulting service needs that cannot be met in any other tier and the client must present a substantial risk of harm to ██████ or others. Clients who reside in a licensed residential facility and receive any of the following services shall be assigned to Tier One: (a) intensive behavioral residential habilitation services; (b) behavior focus residential habilitation services at the moderate or above level of support; (c) standard residential habilitation at the extensive 1, or higher, level of support; or (d) special medical home care. It has not been demonstrated that Petitioner qualifies for a Tier One assignment.”

6. Petitioner next objects to the ALJ’s finding in paragraph 39 that

“Tier Three is appropriate for Petitioner because ██████ lives in a group home, ██████ receives residential habilitation services at the basic or minimal level, and ██████ is not eligible for the Tier One or Tier Two waiver.”

Petitioner does not contest the finding in paragraph 1 of the Findings of Fact that Petitioner “lives in a group home.” Petitioner does not contest the finding in paragraph 21 of the Findings of Fact that “the approved expenditure for Petitioner’s residential habilitation services is consistent with the rate for minimal level of support.” Finally, the ALJ concluded that Petitioner is not eligible for the Tier One or Tier Two waiver. While the Final Order acknowledges that paragraph 37 of the Recommended Order does not include all of the requirements for assignment to Tier One, the ultimate finding that there is no demonstration that Petitioner qualifies for Tier One is correct. Therefore, Petitioner’s exception to this finding is denied.

7. Finally, Petitioner objects to the finding in paragraph 42 of the Findings of Fact which states that “Petitioner could also voluntarily relinquish ██████ adult dental

services. In that case, Petitioner could travel to Gainesville, Florida, to see a dentist at Tacachale, an ICF.” Petitioner contends that there is no evidence in the record to show that Petitioner would qualify for those services.

Respondent’s witness testified that, if Petitioner eliminated or reduced his adult dental services, arrangements could be made for him to get dental services at the APD facility at Tacachale. T@26,100, 101. The evidence supports the Finding of Fact and Petitioner’s exception is denied.

CONCLUSIONS OF LAW

The Administrative Procedures Act grants an agency authority to modify the Conclusions of Law in a Recommended Order as they relate to laws or rules over which it has substantive jurisdiction. See §120.57(l), Florida Statutes (2008). An Agency has recognized expertise in the interpretation and application of its operable statute and implementing rules. This is the reason that courts give great deference to an Agency’s interpretation of those statutes and rules. Floridian Community Bank, Inc. v. State, Office of Financial Regulation, Div. of Financial Services, 989 So.2d 1231 (Fla. 4th DCA 2008)

8. Petitioner first objects to the conclusion in paragraph 47 that cites Section 393.0661(7) as authorizing the Agency to make adjustments to Waiver benefits and services that are “necessary to comply with the availability of moneys and any limitations or directions provided for in the General Appropriations Act.” Petitioner argues that that section of the law actually authorizes the Agency for Health Care Administration (AHCA), in consultation

with the Agency for Persons with Disabilities, to do specific things to insure the availability of funds and compliance with the General Appropriations Act.

To be completely accurate, the cited provision of the Florida Statutes does not authorize either AHCA or APD to do anything. Rather, it provides that nothing else in that section or in any administrative rule shall be construed to prevent or limit AHCA, in consultation with APD, from doing the enumerated things. Regardless of the technicalities of what that subsection of the law provides, it is not relevant to this proceeding since there is no finding that either AHCA or APD has attempted to adjust Petitioner's benefits or services other than as required by statute or rule. Consequently, paragraph 47 is deleted from the Final Order.

9. Petitioner disagrees with the ALJ's conclusion in paragraph 54 that the Agency properly evaluated each of the factors set forth in Florida Administrative Code Rule 65G-4.0021 and used the criteria set forth in Section 393.0661 and Rules 65G-4.0022 through 65G-4.0025 in making Petitioner's tier assignment. Petitioner does not offer any specific reason for why ■■■ disagrees with the ALJ's conclusion on this issue other than to "reassert and incorporate by reference ■■■ exceptions to the Findings of Fact." The record and the ALJ's Findings of Fact are more than sufficient to support the ALJ's conclusion on this issue. The Petitioner's exception is denied.

10. Petitioner next argues that the ALJ erred in paragraph 55 when ■■■ concluded that Petitioner is not eligible for Tier One because ■■■ does not possess any intensive medical or adaptive needs or any behavioral problems

that are exceptional in intensity, duration, or frequency. The ALJ goes on to note that Petitioner is not authorized to receive standard residential habilitation services at the extensive level. According to Petitioner, a valid tier assignment cannot be made without a consideration of whether Petitioner's service needs cannot be met in either Tier Four, Tier Three, or Tier Two; and that, since the Agency did not consider this, the ALJ could not properly conclude that ■■■ is not eligible for Tier One.

Petitioner's argument conveniently ignores the statutory language that those service needs must be for intensive medical or adaptive needs or the behavioral problems must be exceptional in intensity, duration, or frequency. Before it is necessary to consider whether Petitioner's service needs cannot be met in any of the other tiers, it is first necessary to determine that ■■■ possesses intensive medical or adaptive needs or behavioral problems that are exceptional in duration, intensity, or frequency. And, as paragraph 33 finds, there is no evidence that Petitioner has such needs or problems.

Petitioner's position is that Tier One is a "catchall" category for persons whose approved cost plans exceed in dollar amount the monetary caps of the tier to which they have been assigned. This argument fails on two grounds. First, it ignores the fact that one of the stated legislative purposes in adopting the tiers was to gain some measure of fiscal control over the program. Second, it ignores the express language of section 393.0661(3)(a) that makes Tier One a limited category for persons with specific intensive needs.

Petitioner's exception is denied.

11. Petitioner also objects to the Conclusion of Law found in paragraph 57 wherein the ALJ found that Tier Three is the appropriate placement for Petitioner. Again, Petitioner asserts that Respondent did not consider whether Petitioner's needs could be met in Tier Three and whether such assignment would avoid his institutionalization. Citing Florida Administrative Code Rule 65G-4.0024(1), the ALJ found that Petitioner met the standards for Tier Three. ■■■ resides in a licensed residential facility, receives standard residential habilitation services at the minimal level and is not eligible for the Tier One or Tier Two Waiver. The ALJ's legal conclusion was based on the evidence that was presented at the hearing.

12. Finally, Petitioner objects to the conclusion in paragraph 59 that Respondent has met its burden of proof by a preponderance of the evidence. As the ALJ states in paragraph 45, the Agency has the burden of proving by a preponderance of the evidence that Petitioner should be assigned to Tier Three. As discussed above in paragraph 11 and reiterated by the ALJ in paragraph 59, the Agency presented evidence at the hearing that the ALJ found was sufficient to meet this obligation.

Accordingly, upon review of the complete record in this case, including the Recommended Order, the submissions and arguments of the parties, and being otherwise fully advised in the premises, the Recommended Order as modified by this Final Order, is adopted. ■■■. is placed in Tier Three. ■■■. shall contact ■■■ Waiver Support Coordinator to submit a revised cost plan to the Area Office consistent with this decision.

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

Mac McCoy, Operations Officer
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

Information about some sources of possible legal assistance maybe found at:
<http://apd.myflorida.com/customers/legal/resource-listing.htm>

Copies furnished to:

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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.

Claudia Llado, Clerk of the Division
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

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 or electronic mail, this 13th day of August, 2009.

Percy W. Mallison, Jr., Agency Clerk
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Tallahassee, FI 32399-0950