

(Secretary) upholding the Order of the Department of Public Welfare (DPW), Bureau of Hearing and Appeals (BHA), which adopted an Administrative Law Judge's (ALJ) Recommendation and dismissed the appeal of their request for expungement of the indicated report of child abuse for sexually abusing their daughter, S.F. (Minor). On appeal, Parents argue that: (1) Minor's testimony before the ALJ was tainted; (2) Minor is not credible; and (3) the BHA's decision denying their appeal was not based on substantial evidence. In addition, Father asserts that his appeal should be granted because no criminal charges were filed against him, and Mother contends she took reasonable steps to protect Minor. For the following reasons, we affirm.

On March 24, 2009, the Bucks County Office of Children and Youth Social Services Agency (CYS) filed an indicated report of child abuse with Childline Registry. The report named Father as the perpetrator of sexual abuse or exploitation of Minor and named Mother as the perpetrator of sexual abuse or exploitation by omission of Minor. The facts of the investigative report, which gave rise to the indicated report, are as follows:

[Minor], disclosed that when her mother leaves the home to walk the dog or run errands, her father asks her to come into his bedroom. He licks or sucks [Minor]'s breasts, fingers her vagina and/or licks her vagina. He asked [Minor] to suck his penis but she refused. [Minor] told her mother and her mother confronted her father but he denied it.

(CYS Investigation Report at 2.) DPW denied Parents' request for expungement of their names from the Childline Registry on June 18, 2009. On December 8, 2009, an administrative hearing was held at which Minor and CYS Investigator

Georgia Gray (Investigator) testified. On April 27, 2010, the ALJ made the following relevant findings of fact:

4. At the time the abuse occurred, [Minor] was about 12 years old. (Ex CY-3)
5. When [Minor] was living at her parents['] home her father touched her in her private parts. (NT-34)
6. The first abuse was in her father's bedroom. (NT-33)
7. Private parts included her genitals. (NT-35)
8. He touched her with his hands and mouth. (NT-35)
9. Her father touched her on about 10 occasions. (NT-38)
10. The presiding officer and the Attorney for CYS and both Attorneys for the Appellants agreed that [Minor] was competent to testify. (NT-27)
11. [Minor] testified that she told her mother that her father was "touching me in the wrong places." (NT-42)
12. Her mother told her to see if it happens again. (NT-42)
13. [Minor] said she told her mother a second time. (NT-43)
14. Her mother told her to see if it happens again. (NT-43)
15. [Minor] testified that her mother asked her father in her presence if he was having inappropriate contact with her. (NT-44)
16. [Father] denied the abuse but afterw[a]rd he abused her again. (NT-45)
17. [Minor] substantially supported her direct testimony on cross-examination. (NT-66)

18. [Investigator], the CYS second witness testified that she found the [minor] to be clear and credible. (NT-87)
19. [Minor]’s testimony was consistent and credible on both direct and cross-examination in all relevant parts.
20. [Investigator] further testified that she believed the determination she made was correct under the Child Protective Services Law. (NT-94)
21. Neither appellant testified.

(Findings of Fact (FOF) ¶¶ 4-21.) The ALJ found “that [Minor] was sometimes a little confused” but, nonetheless, found her “completely credible when she testified about [Father]’s touching and licking her, and about her disclosure of the abuse to her [M]other and of [Mother]’s response.” (ALJ Op. at 13.) In addition, the ALJ found Parents did not provide direct testimony contradicting the evidence and did not “effectively create doubt by cross-examining [Minor].” (ALJ Op. at 13.) Accordingly, the ALJ recommended that Parents’ appeals be denied.

On May 7, 2010, the BHA adopted the ALJ’s Recommendation in its entirety. On May 24, 2010, Parents filed a Petition for Reconsideration, which was granted by the Secretary on June 7, 2010. On August 24, 2010, the Secretary, after reconsidering the Order of the BHA, entered a Final Order upholding the Order of the BHA. Parents now petition this Court for review.²

² “Our scope of review is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether legal error has been committed, or whether constitutional rights have been violated.” K.J. v. Pennsylvania Department of Public Welfare, 767 A.2d 609, 611 (Pa. Cmwlth. 2001).

The Child Protective Services Law (CPSL) defines child abuse, in pertinent part, as “[a]n act or failure to act by a perpetrator which causes . . . sexual abuse or sexual exploitation of a child under 18 years of age.” 23 Pa. C.S. § 6303(b)(1)(ii). “Sexual abuse or exploitation” is defined, in relevant part, as “[t]he employment, use, persuasion, inducement, enticement or coercion of a child to engage in or assist another individual to engage in sexually explicit conduct.” 23 Pa. C.S. § 6303(a). DPW’s regulations at 55 Pa. Code § 3490.4 further define “sexual abuse or exploitation” as including indecent assault pursuant to Section 3126 of the Crimes Code, which is defined as “indecent contact with the complainant [who] is less than 13 years of age.” 18 Pa. C.S. § 3126(a)(7). The Crimes Code defines “indecent contact” as “any touching of the sexual or other intimate parts for the purpose of arousing or gratifying sexual desire, in either person.” 18 Pa. C.S. § 3101. The CPSL also defines child abuse as a “failure to act . . . or failures to act by a perpetrator which creates an imminent risk of . . . sexual abuse or sexual exploitation of a child under 18 years of age.” 23 Pa. C.S. § 6303(b)(iii).

In this case, there is an indicated report of child abuse filed against Father for sexually abusing Minor and an indicated report of child abuse filed against Mother for sexually abusing Minor by failure to act upon Minor’s report of abuse by Father. The CPSL defines an “[i]ndicated report” as “[a] child abuse report” based on a determination by CYS or DPW that “substantial evidence of the alleged abuse exists.” 23 Pa. C.S. § 6303(a). Parents argue that the indicated report of child abuse is not accurate and should be expunged because DPW improperly relied on Minor’s incredible testimony. Specifically, Parents contend that Minor’s testimony was tainted because, before Minor discussed the abuse with Investigator,

she was influenced by the conversations she had with her grandmother, her grandmother's friend, and two police officers. However, the case on which Mother relies, Commonwealth v. Delbridge, 580 Pa. 68, 859 A.2d 1254 (2004), does not support the contention that any alleged taint affected Minor's *credibility*. "[T]aint implicates the ability of a child to distinguish real memories of an event from falsely implanted suggestions." Delbridge, 580 Pa. at 71-72, 859 A.2d at 1256. Because taint can lead to false testimony, it "raises a legitimate question of witness *competency* in cases involving complaints of sexual abuse by young children." Delbridge, 580 Pa. at 71, 859 A.2d at 1256 (emphasis added). When there is an issue of taint, *it must be brought up at a competency hearing*, and it is the burden of the party raising the question "to present some evidence of taint" before the issue can be explored. Id. (Emphasis added.) The party raising the question must "overcome the presumption of competency by clear and convincing evidence." Id.

Here, the ALJ specifically addressed Minor's competency at the hearing, and found Minor was competent to testify. (FOF ¶ 10.) During the hearing, the ALJ stated, "I find that this child is competent to testify based on the answers to the questions I've asked her so far. They made sense. They . . . had a lot of thought behind them sometimes. And I don't see that she's emotionally unstable enough to exclude her from this hearing." (Hr'g Tr. at 27-28.) Father's counsel agreed to the ALJ's characterization and decision. (Hr'g Tr. at 28.) Mother's counsel neither objected nor agreed that Minor was competent enough to testify. No allegations of taint were raised during the time that Minor's competency was being determined. Because taint is an issue of competency, and because there was no objection to Minor's competency to testify on the basis of any alleged taint, we

conclude, pursuant to Delbridge, that said alleged taint does not affect Minor's credibility.

Parents next argue that DPW erred in crediting the testimony of Minor. Essentially, Parents attack the weight of the evidence, by arguing that: (1) there was countervailing evidence on cross-examination that Minor accused Father of these acts because she was mad at him; (2) Minor was only interviewed one time by Investigator; and (3) Minor's testimony was similar to her testimony in a prior report.³ In addition, Parents argues there were no pictures, forensic evidence, diaries, corroborating witness accounts, or medical evidence to support Minor's testimony. (Father Br. at 9; Mother Br. at 14.)

In expungement proceedings, CYS has the burden of proving by substantial evidence that the alleged perpetrator's conduct falls within one of the definitions of child abuse as set forth in Section 6303(b)(1) of the CPSL. E.D. v. Department of Public Welfare, 719 A.2d 384, 388 (Pa. Cmwlth. 1998). "In the context of child abuse expungement proceedings, 'substantial evidence' is defined as evidence which 'so preponderates in favor of a conclusion that it outweighs, in the mind of the fact[.]finder, any inconsistent evidence and reasonable inferences drawn therefrom.'" Bedford County Children and Youth Services v. Department of Public Welfare, 613 A.2d 48, 50 (Pa. Cmwlth. 1992) (quoting Children & Youth Services Division, Department of Human Services, County of Northampton v. Department of Public Welfare, 520 A.2d 1246, 1249 (Pa. Cmwlth. 1987)). The

³ Minor had previously filed a report against her brother, stating that he had touched her in inappropriate ways. (Hr'g Tr. at 49.)

BHA “functions as the finder of fact in expungement hearings.” R. v. Department of Public Welfare, 535 Pa. 440, 447, 636 A.2d 142, 145 (1994).⁴ “It is the job of the fact finder to resolve conflicts in testimony and make *specific findings of fact* to apprise this Court of the legal and factual bases for his conclusions.” Bucks County Children and Youth Social Services Agency, 616 A.2d 170, 174 (Pa. Cmwlth. 1992) (emphasis in original). This Court will not disturb the determinations of the fact finder, where “the fact finder has determined the weight and credibility of evidence.” Bucks County Children and Youth Social Services Agency v. Department of Public Welfare, 977 A.2d 1254, 1256 (Pa. Cmwlth. 2009).

In this case, the ALJ found Minor “completely credible when she testified about [Father]’s touching and licking her, and about her disclosure of the abuse to [Mother] and of [Mother]’s response.” (ALJ Op. at 13.) Parents’ contention that Minor alleged the acts of sexual abuse because she was mad at Father is not supported by the evidence. There is nothing in the transcript to suggest that Minor alleged these abusive acts because she wanted to get out of the house, because she was angry with Parents, or because she did not want to follow Parents’ rules. On the contrary, when Minor was questioned about being angry with Father, she specifically stated that she was mad at him “because of what he did.” (Hr’g Tr. at 60.)⁵ In addition, when questioned whether the allegations she made against her

⁴ Here, the BHA adopted the Recommendation of the ALJ in its entirety. (Order, May 7, 2010 at 1.) We recognize that the BHA is the ultimate fact finder but, for purposes of this opinion, because the BHA adopted the findings of the ALJ, we refer to the fact finder as the ALJ.

⁵ The following exchange took place between Father’s lawyer (Q) and Minor (A):

Father were false, Minor responded, “no.”⁶ The ALJ found Minor’s testimony credible that Parents abused her. Parents did not present any evidence or testimony

Q. I want you to take yourself backwards a little bit and try to remember how things were in the house? In other words, how were you getting along with your dad at the time right before you left and didn’t return?

A. I think not so well.

Q. Why was that?

A. I think because I was mad at him because of what he did.

Q. Because of these things that you’ve talked about today?

A. Yes.

Q. Were there rules in the house?

A. I think so.

Q. Did you have chores to do?

A. Yes.

Q. Did you have a time when you had to be in bed, a curfew?

A. Yes.

Q. Did you have rules on when you could use the computer or when you could talk on the phone?

A. No.

Q. Were you upset at all about the rules that you had in the house?

A. Kind of.

Q. In fact, you agree with me that sometimes that made you angry with your dad about the rules that he put down in the house, is that true?

A. Yes.

...

Q. And the reason that you wanted to leave your parent[s]’ house was because you weren’t getting along particularly well with either your dad or your mom, isn’t that right?

A. Yes.

(Hr’g Tr. at 59-61.)

⁶ The following exchange took place between the Solicitor for CY5 (Q) and Minor (A):

Q. Did you make up what you said that your dad did to you?

A. No.

...

Q. Did you make up what you said that your dad did to you because you wanted to get out of the house and go live at your grandmother’s?

A. No.

Q. Are you sure?

before the ALJ to support their contention that Minor made false allegations because Minor was allegedly mad at Parents. It is solely for the ALJ to weigh all the evidence and this Court will not disturb the ALJ's findings when they are supported by substantial evidence.

Parents also take issue with the fact that Investigator interviewed Minor one time prior to CYS filing an indicated report of child abuse against Parents. However, Parents did not submit any testimony or evidence to support their contention that Investigator needed to interview Minor more than once to properly conduct the investigation. In fact, before the ALJ, Investigator credibly testified that there is a detriment to repeat interviews with a minor and that "one interview with this child was significant enough to gather the information that she was able to provide." (Hr'g Tr. at 86.) In addition, Investigator testified that she found Minor to be credible as support for making the indicated reports. (Hr'g Tr. at 87-90.) The ALJ found Investigator credible that she found Minor to be clear and credible and that the determination Investigator made was correct under the CPSL. (FOF ¶¶ 18, 20.) Likewise, the ALJ found Minor credible and this Court will not alter the credibility determinations or weight of the evidence.

Parents contend that Minor is not credible because she reported similar activity of abuse in the past; however, no evidence or testimony was presented at

A. Yes.

...

Q. You're sure that no matter how mad you would have been about the rules that you didn't make what you had to say today up?

A. No.

(Hr'g Tr. at 75-76.)

the hearing to support this contention. This Court notes that Minor testified that she had reported her brother for inappropriate contact in the past.⁷ However, when the Solicitor for CYS asked Minor if there was any confusion in her mind as to what happened between her brother and Father, Minor answered “[n]o.” (Hr’g Tr. at 77.) The ALJ determined that Minor was credible when she testified about Father sexually abusing her and it is not for this Court to reweigh the evidence.

Parents also contend that the indicated report of child abuse is not supported by substantial evidence because there were no pictures, forensic evidence, diaries, or corroborating witness accounts to support the testimony of Minor; and there was no medical evidence of sexual abuse. (Father Br. at 9; Mother Br. at 14.) DPW’s regulations require that an indicated report of child abuse be based upon: “(i) *[a]vailable* medical evidence[;] (ii) [t]he child protective service investigation[; *or*] (iii) [a]n admission of the acts of abuse by the perpetrator.” 55 Pa. Code § 3490.4 (emphasis added). “[M]edical evidence is only one basis upon which an indicated report of child abuse may be based,” K.J., 767 A.2d at 612, and, here, the

⁷ The following exchange took place between Father’s lawyer (Q) and Minor (A):

Q. [Minor], I had just asked you a few questions about your brother, . . . And one of my questions was whether or not you had made a report to someone, or anyone, that, in fact, [Brother] had had inappropriate contact or had touched you in inappropriate ways. Have you made that report to someone?

A. I might think so but I don’t remember for sure.

Q. Did you tell anyone that [Brother] had touched you in any way?

A. Yes.

...

Q. When you told someone about what happened with [Brother], you told them that he had touched your private parts, isn’t that true?

A. Yes.

(Hr’g Tr. at 49-50.)

investigation by CYS is a sufficient basis for the indicated report. 23 Pa. C.S. § 6303. Nowhere in the Law does it provide that the indicated report *must* be supported by any of the additional factors that Parents argue were lacking. K.J., 767 A.2d at 612.

In addition to Parents' attack on Minor's credibility before the ALJ, Father argues that because the police did not file criminal charges against him based on this matter, there is no credible evidence to support the indicated report. (Father Br. at 9.) However, this Court has previously held that "[a]n indicated report of child abuse under the CPSL may be proper in a situation in which criminal charges are not." F.R. v. Department of Public Welfare, 4 A.3d 779, 787 (Pa. Cmwlth. 2010). There is a "more onerous standard to prove child abuse" in the criminal context than to prove child abuse in the administrative setting under the CPSL. Id. at 785. Based on our precedent, it is not relevant that criminal charges have not been filed against Father in this matter.

Finally, Mother argues that CYS did not meet its burden of proof because she took reasonable steps to protect Minor from sexual abuse by Father. This Court has held that the standard for determining whether a parent is "a perpetrator by omission is whether a reasonable person in the position of the caretaker, *knew or should have known* that acts of abuse were occurring and the parent . . . failed to take steps to remove the child from harm's way." Bucks County Children and Youth Social Services Agency, 616 A.2d at 174 (emphasis in original). It is for the ALJ, as fact finder, to determine whether Mother "acted reasonably under the circumstances." Id.

Here, the ALJ found Minor credible that she told Mother that Father was sexually abusing her on two separate occasions and, on both occasions, Mother told Minor to see if it happens again.⁸ After Minor informed Mother that the abuse was continuing, Minor testified that Mother confronted Father in her presence, and that Father denied having inappropriate contact with her. (FOF ¶¶ 13-16.) However, according to Minor, Father continued to abuse her even after Mother questioned Father. (FOF ¶ 16.) The question of whether Mother “acted reasonably under the circumstances,” Bucks County Children and Youth Social Services Agency, 616 A.2d at 174, is for the fact finder to determine. Here, the ALJ found that, based on the substantial evidence, Mother knew the abuse was occurring and did nothing. (FOF ¶¶ 11-14.) The ALJ did not specifically make a finding about whether Mother acted reasonably under the circumstances; however, he implicitly found that she had not because he recommended that Mother’s appeal be denied.

⁸ The following exchange took place between the Solicitor of CYS (Q) and Minor (A):

Q. [Minor], at some point in time did you tell your mom what was going on?

A. Yes.

Q. What was the first thing that you told her?

A. That he was touching me in the wrong places.

Q. And when you told her that, what did she tell you?

A. To see if it will happen again.

Q. And did it happen again?

A. Yes.

Q. And did you tell her that it happened again?

A. Yes.

....

Q. And when you told her the second time, what did she say to you?

A. I think to see if it happened again.

Q. And did it happen again?

A. Yes.

(Hr’g Tr. at 42-43.)

The BHA adopted that Recommendation as its own and, given the circumstances and evidence in this case, we discern no error in denying Mother's appeal from her request for expungement of the indicated report of child abuse on the Childline Registry because she did not take sufficient steps to remove Minor from the abusive environment. Likewise, the Final Order dismissing Father's appeal of his request for expungement of the indicated report of child abuse was appropriate because the evidence reflects that Father sexually abused Minor under the offense of indecent contact when he touched Minor in inappropriate places.

For these reasons, we affirm the Final Order of the Secretary.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

V.F. In Re: S.F.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1927 C.D. 2010
	:	
Department of Public Welfare,	:	
	:	
Respondent	:	
	:	
C.F. In Re: S.F.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1935 C.D. 2010
	:	
Department of Public Welfare,	:	
	:	
Respondent	:	

ORDER

NOW, August 12, 2011, the Final Order of the Secretary of Public Welfare in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge