

Siegal was twenty-four years old at the time of the Hearing Officer's decision and was diagnosed with Asperger's Syndrome.² Siegal receives Supplemental Security Income (SSI) benefits. Siegal's father, Mr. Siegal, filed an application on behalf of his son for the Adult Autism Waiver on May 9, 2009. On June 16, 2009, BAS conducted a level of care assessment with Siegal to determine if he had any substantial functional limitations in areas of major life activity. The interview was conducted in Pittsburgh in the presence of Siegal's mother.

By letter dated July 10, 2009, the BAS informed Siegal that his application was denied because Siegal did not meet the Intermediate Care Facility-Other Related Conditions (ICF-ORC) level of care criteria. The level of care assessor determined that Siegal had no substantial limitations. A BAS notice dated August 7, 2009, indicated that Siegal chose not to be evaluated for Intermediate Care Facility-Mental Retardation (ICF-MR) Level of Care.

Mr. Siegal timely appealed the denial of the Adult Autism Waiver on behalf of his son. After the appeal, the BAS conducted a new Level of Care

² MayoClinic.com defines Asperger's Syndrome:

[A] developmental disorder that affects a person's ability to socialize and communicate effectively with others. Children with Asperger's syndrome typically exhibit social awkwardness and an all-absorbing interest in specific topics.

Doctors group Asperger's syndrome with other conditions that are called autistic spectrum disorders or pervasive developmental disorders. These disorders all involve problems with social skills and communication. Asperger's syndrome is generally thought to be at the milder end of this spectrum.

assessment of Siegal and determined that Siegal met one substantial functional limitation in the Self-direction domain. In order to be eligible for the Adult Autism Waiver, an applicant must have substantial functional limitations in three areas of major life activity.

The Hearing Officer conducted a hearing on October 20, 2009. Pia Newman (Newman) of the BAS described the Adult Autism Waiver:

The adult autism waiver is a home and community based services waiver authorized under Section 1915(c) of the Social Security Act. Under that authority, the Commonwealth has the discretion to define the population to be served by the waiver within certain parameters.

One of these parameters is the level of care requirement. The Federal Centers for Medicare and Medicaid Services state that these programs furnish an array of home and community-based services that assist Medicaid beneficiaries to live in the community and avoid institutionalization. The level of care eligibility criteria is meant to evaluate whether an applicant, left for the provision of such services, would require the level of care accorded in an institutional setting. In the case of the adult autism waiver, that institutional setting would be an intermediate care facility for persons with mental retardation or for other persons with other related conditions including autism.

Pennsylvania Code defines criteria for persons with other related conditions as including substantial limitation in at least three out of six activities of daily living. These activities of daily living are defined in the State Medicaid manual as self-care, receptive and expressive language, learning, mobility, self-direction and capacity for independent living.

The purpose of the Level of Care Assessment . . . which was conducted as part of the eligibility determination for the adult autism waiver, is not to serve as a detailed or thorough evaluation as one might do before designing the service plan, but to determine whether the applicant meets the threshold level of need I have described. A failure to meet the level of care criteria does not mean that the Applicant has no needs at all or would not benefit from any supports. This assessment is designed to distinguish between those who are at risk of institutionalization and those who are not.

Notes of Testimony, October 20, 2009, (N.T.) at 7-8.

Newman also testified that Siegal was denied enrollment in the Adult Autism Waiver because the level of care assessor determined that Siegal did not meet the criteria for level of care. N.T. at 8. After a second interview, Newman confirmed that Siegal had a substantial limitation in only one activity of daily living, self-direction. N.T. at 10.

Patty Gould-Lucht (Gould-Lucht) of the BAS submitted into evidence the IFC/ORC Level of Care Decision. Gould-Lucht explained that in the area of self-care Siegal stated that he independently performed such tasks as bathing, grooming, personal hygiene, and oral hygiene. He did his laundry approximately once a week and wore clothes appropriate to different settings. While he did not cook much, Siegal believed that he maintained a reasonable diet of prepared and takeout foods and that he occasionally used an oven to cook fish sticks and other frozen foods. N.T. at 15. With respect to receptive and expressive language, Gould-Lucht reported that Siegal had a strong command of both expressive and receptive language skills. N.T. at 19. In the area of learning, Siegal was a college

graduate with a B.A. in history from the University of Pittsburgh. N.T. at 22.
Gould-Lucht found no limitations with Siegal's mobility. N.T. at 23.

Gould-Lucht did believe that in the area of self-direction Siegal met the level of care:

This is the one area that we felt as though David [Siegal] does meet level of care. This is an area that looks at the person's ability to understand and evaluate options, to seek more information when appropriate, to select alternatives and understand and receive the consequences of choices and actions and the ability to process extra concepts. Also the ability to resist acting impulsively.

In our conversation with David [Siegal] we found . . . that he . . . has made numerous decisions in his life including day-to-day decision[s], like his college major, where he chooses to live and such. He does appear . . . challenged with deciding how to move forward in prioritizing necessary tasks and responsibilities receptive to the kinds of things he needs and wants in his life.

. . . .
He is living on a minimal means . . . provided to him through Social Security or SSI and food stamps. He did repeatedly state that he needs and wants a job, although he doesn't seem to be pursuing it in a way that may provide an opportunity for him to really secure a job. Although it is a tough economy right now, we do feel as though his self-direction in this area is missing and lacking

N.T. at 24-25.

Gould-Lucht determined that Siegal met the standard for capacity for independent living. There were no reported instances of manipulation or exploitation of others, and he has independently traveled by air, train, and bus.

N.T. at 27. Further, Siegal lived in an apartment in Pittsburgh and maintained what he considered a reasonable diet. N.T. at 28.

Mr. Siegal testified that he attended a conference on police and autism where a police detective gave a lecture and stated that he cautioned law enforcement officials to be aware of false positive responses when questioning a witness with autism. N.T. at 39. Mr. Siegal submitted material from the website of the National Health and Law Program concerning someone with Asperger's where the individual qualified for care for ICF-MR (Intermediate Care Facility-Mental Retardation) even though she was not mentally retarded but had significant limitations in four areas of daily living. N.T. at 40-41. Mr. Siegal also presented the Centers for Medicare and Medicaid Services guidelines which included a listing for economic self-sufficiency for regulations that met the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §6001, for the ICF-MR benefit. N.T. at 47. Mr. Siegal also submitted the adjudication from the Social Security Administration under which Siegal was awarded SSI. Mr. Siegal testified that while his son was a college graduate with a high-functioning IQ, he had many problems:

Judge Case, he started college and was on the Dean's list the first semester. By virtue of his changing colleges and trying to say . . . Pitt was going to be a better school for journalism and then subsequently changing his major and with his suicide attempt and major depressive disorder, he became progressively worse. So that where he started out as an exceptional student, commensurate with his high-functioning IQ, he was falling apart. . . And when you start seeing that after --- one subject after another he would drop in his later years, after having a number of college credits under his belt in three different locations. This was a situation that was getting worse. . . .

N.T. at 57.

Mr. Siegal also believed that Siegal lacked the capacity for independent living because he made political contributions when he could not really afford to do so, did not keep his appointments, and did not keep his apartment clean. N.T. at 59. Mr. Siegal introduced into evidence photographs which indicated the disorder in Siegal's apartment as well as some medical records.

Gould-Lucht testified that economic self-sufficiency was not applicable because economic self-sufficiency only applied to someone with mental retardation. N.T. at 76-77.

The Hearing Officer denied Siegal's appeal:

The Appellant's representative [Mr. Siegal] indicated in his testimony that, in his opinion, his son's eligibility for SSI should have bearing on his eligibility for the Adult Autism Waiver, because the same factors that led to SSI approval are those that should qualify him for Adult Autism Waiver Services. A review of the purposes of each of the two programs, as cited above, indicates a clear disparity of purpose. The determination by SSI that the Appellant [Siegal] was disabled in the context of being able to obtain and sustain gainful employment does not mean that the Appellant [Siegal] qualifies for a waiver program that is mean [sic] to keep a person in the community and avoid institutionalization. The Appellant's representative also expended much effort to persuade the Hearing Official that because autism has commonalities with mental retardation, a seventh factor should be added to the list of activities of daily living for which his son was evaluated and offered Exhibits A-1

and A-2 as evidence. Regulations pertaining to the Home and Community-Based Services Waiver make a definitive quality distinction between the activities of daily living evaluated for ICF/MR level of care evaluations and ICF/ORC (Other Related Conditions) level of care evaluations. As cited in §6210.63(1) [55 Pa.Code §6210.63(1)] above, there must [be] a diagnosis of mental retardation by a qualified mental retardation professional that the applicant has ‘performance that is more than two standard deviations below the mean as measurable on a standardized general intelligence test’ or ‘performance that is slightly higher than two standard deviations below the mean of a standardized general intelligence test during a period when the person manifests serious impairments of adaptive behavior.’ Given that standard, there was not evidence presented during the course of the hearing that the Appellant [Siegal] is mentally retarded. Therefore, he must be evaluated on only the six activities of daily living used in the Agency’s assessment tool.

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In summary, the Hearing Official cannot find any evidence in the exhibits, testimony, or regulations to counter the Agency’s assessment that the Appellant [Siegal] meets the level of care criteria in more than one activity of daily living. Since level of care criteria must be found in three activities of daily living to qualify for the Adult Autism Waiver, the Hearing Official must rule that the decision of the Agency to deny the Appellant’s [Siegal] application for the Adult Autism Waiver was correct, and the Appellant’s [Siegal] appeal is denied.

Adjudication, December 4, 2009, at 11-12.

On December 14, 2009, the Chief Administrative Law Judge of the DPW Bureau of Hearings and Appeals affirmed the Hearing Officer’s decision. Siegal applied for reconsideration. On January 28, 2010, the Secretary of DPW granted the request for reconsideration. On September 15, 2010, the Secretary of DPW issued a Final Order and upheld the December 14, 2009, order.

Siegal contends that the Hearing Officer disregarded federal law and regulations defining mental retardation and failed to consider whether he was capable of economic self-sufficiency. Siegal also contends that the Hearing Officer failed to admit and/or consider voluminous and material documentary evidence proffered by Mr. Siegal, that the Hearing Officer improperly allowed two hearsay statements from BAS staff while similarly blocking Mr. Siegal's statements and allowed those statements to contribute to her erroneous decision, that the Hearing Officer disregarded and failed to give weight to a prior decision of the Social Security Administration regarding Siegal's disability, that the Hearing Officer failed to correctly apply all of the factors to determine eligibility for the Adult Autism Waiver because the Hearing Officer did not apply all seven factors under the definition of someone in the mentally retarded category, that the Hearing Officer failed to apply the appropriate federal regulations and definitions under the Section 4398 of the Centers for Medicaid & Medicare Services (CMS) State Medicaid Manual, that the Hearing Officer erred when she concluded that Siegal possessed sufficient expressive language and receptive language skills when the body of evidence consistently spoke of communication problems and based her denial of services on this ground, and that the Hearing Officer erred when she concluded that Siegal possessed sufficient independent living skills and self-care skills when the body of evidence consistently highlighted problems and her denial of services was based on this ground.³

³ This Court's review is limited to a determination of whether constitutional rights were violated, an error of law was committed, or the necessary findings of fact were not supported by substantial evidence. Gibbs v. Department of Public Welfare, 947 A.2d 233, 236 n.2 (Pa. Cmwlth. 2008).

I. Mental Retardation.

Initially, Siegal contends that the Hearing Officer disregarded federal law and regulations regarding mental retardation.⁴ Siegal argues that the Hearing Officer erred when she determined that one must be mentally retarded in order to qualify for the determination of services for a mentally retarded qualified applicant for the Adult Autism Waiver Program. Siegal asserts that the abbreviation of mentally retarded should be considered only as a placeholder for an expanded definition and that the definition contained in DPW's regulation is too narrow.

DPW's regulation, 55 Pa.Code §6210.62(a), sets forth the level of care criteria for an applicant who applies for an ICF/MR level of care:

There are three fundamental criteria which shall be met prior to an applicant or recipient qualifying for an ICF/MR level of care. The ICF/MR level of care shall be indicated only when the applicant or recipient:

- (1) Requires active treatment.
- (2) Has a diagnosis of mental retardation.
- (3) Has been recommended for an ICF/MR level of care based on a medical evaluation.

The term "ICF/MR" is defined in DPW's regulation at 55 Pa.Code §6210.3:

ICF/MR-Intermediate care facility for the mentally retarded (facility)—A State operated or nonState operated facility, licensed by the Department in accordance with Chapter 6600 (relating to intermediate care facilities for the mentally retarded), to provide a

⁴ Siegal's brief's argument section is one page. Much of Siegal's Statement of the Case is actually argument. This Court will address Siegal's arguments in the order in which they appear in his brief.

level of care specially designed to meet the needs of persons who are mentally retarded, or persons with related conditions, who require specialized health and rehabilitative services; that is, active treatment.

The term “ICF/ORC” is defined in DPW’s regulation at 55 Pa.Code

§6210.3:

ICF/ORC-Intermediate care facility for persons with other related conditions (facility)—A nonState operated facility, licensed by the Department in accordance with Chapter 6600, to provide a level of care specially designed to meet the needs of persons with other related conditions who require specialized health and rehabilitative services; that is, active treatment. Person with other related conditions are persons with severe physical disabilities, such as cerebral palsy, spina bifida, epilepsy or other similar conditions which are diagnosed prior to age 22 and result in at least three substantial limitations to activities of daily living.

Siegal asserts that this definition of mental retardation is too limited and BAS/the Hearing Officer should have applied a broader definition contained in the National Health Law Program – Internet Resource through Pro Bono Net – Titled “Q & A: ICF-MR Level Care and Persons with Related Conditions.” Mr. Siegal admits that he downloaded this document from the internet. An agency will not ignore its own regulations and definitions to adopt, on a case by case basis, general statements from outside sources. DPW’s regulation clearly and plainly states that in order to qualify for the ICF/MR level of care the applicant must have a diagnosis of mental retardation.

II. Section 4398.

Siegal also argues that the Hearing Officer erred because she failed to recognize the applicability of Section 4398 of the CMS State Medicaid Manual to include economic self-sufficiency as an additional activity of daily living. However, a review of Section 4398 which Siegal submitted as an exhibit at the hearing reveals that economic self-sufficiency is not included as an “area of major life activity” for persons with related conditions. It does, though, include economic self-sufficiency as an “area of major life activity” for ICF/MR. Because Siegal did not qualify as mentally retarded, he did not come under the necessary classification. Even if Siegal came under the waiver for ICF/MR, it would still have to be determined that Siegal had substantial limitations in three or more areas of major life activity. Siegal also would have to have substantial limitations in three or more areas of major life activity to qualify under ICF/ORC.

III. Receptive and Expressive Language.

Siegal contends that the Hearing Officer erred when she determined that Siegal did not have substantial limitations in receptive and expressive language. Siegal argues that the BAS worksheet is limited to certain characteristics associated with receptive and expressive language but did not contain factors that were considered when Siegal was determined to be eligible for SSI. Mr. Siegal, however, fails to explain why the BAS should have used the definition of receptive and expressive language he prefers rather than the definition of receptive and expressive language included in the BAS eligibility worksheet which was approved by CMS.

IV. Self-care.

Siegal next contends that that Hearing Officer erred when she determined that Siegal did not have substantial limitations in self-care. Siegal asserts that the report of Patricia Walker from the Office of Vocational Rehabilitation which stated that because Siegal saw his therapist only half of the recommended times and did not consistently take his medication he did have substantial limitations in this area. Mr. Siegal also asserts that Siegal has difficulty organizing his personal belongings and maintaining his personal living space. Mr. Siegal also submitted into evidence photographs of Siegal's apartment to indicate his inability to keep it clean and orderly. Mr. Siegal also questions the determination that Siegal was able to use a microwave and cook for himself.

The Eligibility Worksheet defines "self-care" as "personal hygiene, including bathing grooming, dressing wearing clean clothes, ability to prepare and eat a reasonable diet, ability to self-feed, maintain appearance appropriate to the setting, the ability to independently maintain a reasonable daily schedule (waking, activities, sleeping); the ability to return to bed if awakened at night." Department of Public Welfare, Bureau of Autism Services, Adult Autism Waiver Eligibility Worksheet at 2. BAS concluded that Siegal did not have a substantial limitation in the area of self-care because he independently performed the tasks of bathing, grooming, and oral hygiene; did laundry approximately once a week, wore appropriate clothing and maintained a reasonable diet.

Mr. Siegal does not really question these determinations. The limitations Mr. Siegal suggests: not appearing for scheduled appointments, not consistently taking medication, having difficulty implementing stress and anger

management techniques, and problems organizing his personal belongings and living space, even if true, do not come under the category of self-care as set forth in the Eligibility Worksheet.

V. Capacity for Independent Living.

With respect to the capacity for independent living, Mr. Siegal argues that the Hearing Officer erred when she determined that Siegal did not have a substantial limitation on the capacity for independent living. The Hearing Officer found only one area where Siegal had a substantial limitation. This Court has already dismissed Mr. Siegal's arguments regarding additional areas of substantial limitation. Three areas of limitation are necessary for the Adult Autism Waiver to apply. Even if Mr. Siegal were to prevail on this issue, there would only be two areas of substantial limitation. Therefore, this Court need not address this issue.

VI. Hearsay.

Siegal next contends that the Hearing Officer erred when she admitted certain hearsay statements by BAS personnel. During the hearing Newman testified concerning whether Siegal wanted to be placed under the Adult Autism Waiver:

And when we spoke to David Siegal during the second pre-hearing conference, I did ask him if he wanted to be served under the autism waiver and he said he was 90 --- he felt that 90 percent, he did not feel that he needed those services. And ten percent, he thought maybe it would be worth trying so ---.

N.T. at 36.

Mr. Siegal did not object to the statement. Mr. Siegal seeks to have the statement stricken from the record as inadmissible hearsay. Hearsay is defined in the Pennsylvania Rules of Evidence as “a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Pa.R.E. 801(c). Pa.R.E. 803(25) provides that an admission by a party-opponent is an exception to hearsay: “The statement is offered against a party and is (A) the party’s own statement in either an individual or representative capacity.” Here, the alleged hearsay statement was a statement by Siegal, a party to the action. This statement is an admission by a party-opponent and is an exception to hearsay. Siegal’s argument has no merit.

VII. Social Security Administration.

Mr. Siegal also contends that the Hearing Officer erred when she disregarded the Social Security Administration’s determination that Siegal was eligible for SSI. A review of the adjudication reveals that the Hearing Officer carefully considered the different aims of the two programs to determine that the Social Security Administration’s determination did not apply.

The federal regulation, 20 CFR §416.110, sets forth the purpose of the Supplemental Security Income program:

The basic purpose underlying the supplemental security income program is to assure a minimum level of income for people who are age 65 or over, or who are blind or disabled and who do not have sufficient income and resources to maintain a standard of living at the established Federal minimum income level. The supplemental security income program replaces the financial assistance programs for the aged, blind, and

disabled in the 50 States and the District of Columbia for which grants were made under the Social Security Act. Payments are financed from the general funds of the United States Treasury. Several basic principles underlie the program:

(a) *Objective tests.* The law provides that payments are to be made to aged, blind, and disabled people who have income and resources below specified amounts. This provides objective measurable standards for determining each person's benefits.

In contrast, the purpose of the Home and Community-Based Waiver Program, as set forth in Section 1915(c) of the Social Security Act, 42 U.S.C. §1396n(c), is to permit a state to “furnish an array of home and community-based services that assist Medicaid beneficiaries to live in the community and avoid institutionalization.”

The Hearing Officer reasoned:

A review of the purposes of each of the two programs, as cited above, indicates a clear disparity of purpose. The determination by SSI that the Appellant [Siegal] was disabled in the context of being able to obtain and sustain gainful employment does not mean that the Appellant [Siegal] qualifies for a waiver program that is meant [sic] to keep a person in the community and avoid institutionalization.

As the Hearing Officer determined, nothing in the two programs compels this Court to conclude that qualifying for SSI is determinative of whether an applicant is qualified for the Adult Autism Waiver.

VIII. Data.

Finally, Mr. Siegal argues that Robert Sofranko, the initial evaluator for BAS, did not request the voluminous data Mr. Siegal compiled for use in the SSI determination. Because this Court has determined that the SSI determination is not relevant, this Court finds no error. Further, Mr. Siegal had the opportunity to introduce these documents at the hearing.

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

