IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C.N.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 423 C.D. 2010
	:	Submitted: October 8, 2010
Department of Public Welfare,	:	
	:	
Respondent	:	
	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: December 22, 2010

C.N. petitions for review from an order of the Department of Public Welfare, Bureau of Hearings and Appeals (DPW), which adopted the recommendation of an administrative law judge (ALJ) denying C.N.'s petition for expungement of an indicated report of child abuse pursuant to the Child Protective Services Law (Law), Act of December 19, 1990, P.L. 1240, as amended, 23 Pa. C.S. §§6301-6385. We affirm.

On October 28, 2008, an indicated report of child abuse was filed against C.N.[1] On November 5, 2008, C.N. was informed that his

[1] An "indicated report" is defined as a "child abuse report made pursuant to this chapter if an investigation by the county agency or the Department of Public Welfare *Footnote continued on next page …*

request to expunge the report was denied. On December 15, 2008, C.N. filed an appeal requesting that his name be expunged from the Child Line Registry.

A hearing was thereafter conducted before an ALJ. The ALJ determined that the subject child, J.N., is a male who was approximately four years old at the time of the alleged sexual assault. C.N. is J.N.'s fraternal uncle.

Testimony revealed that on September 3, 2008, the Luzerne County Children and Youth Services (CYS) received a referral that C.N. had "upped" a cigarette in J.N.'s "duppy". A CYS caseworker interviewed J.N. During the interview, J.N. disclosed that C.N. put a cigarette in his buttocks. J.N. stated that at the time of the incident, he was spending the night at his fraternal grandparents' house M.N. and L.N. At the time, C.N. lived with M.N. and L.N.

The caseworker referred J.N. to a counsel advocate. During the counseling sessions, J.N. was consistent in describing the incident wherein, while he was sleeping at his grandparents, C.N. placed a cigarette in J.N.'s buttocks. J.N. was also examined and interviewed by an expert in child abuse pediatrics and was again consistent in describing the incident of sexual abuse involving C.N. Although there was no tissue abnormalities noted during the physical exam, such did not preclude the occurrence of abuse,

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determines that substantial evidence of the alleged abuse exists based on any of the following: (1) Available medical evidence. (2) The child protective service investigation. (3) An admission of the acts of abuse by the perpetrator." 23 Pa. C.S. § 6303(a).

since many types of sexual contact do not cause tissue injury. The doctor testified at the hearing that in his opinion, J.N. was sexually abused by C.N.

J.N. also testified at the hearing. According to J.N., while he was sleeping at his grandparents' home, C.N. came into his bedroom, pulled down J.N.'s pajama bottoms and then put a cigarette in J.N.'s buttocks. After the incident, J.N. threw the cigarette away while everyone else was asleep.

Based on the above, the ALJ recommended that C.N.'s request to expunge the indicated report of child abuse be denied. The DPW adopted the recommendation of the ALJ in its entirety. This appeal followed.[2]

We initially observe that the proper inquiry into whether an indicated report of child abuse should be expunged or maintained is whether the report is accurate. K.J. v. Department of Public Welfare, 767 A.2d 609 (Pa. Cmwlth.), petition for allowance of appeal denied, 567 Pa. 750, 788 A.2d 381 (2001). CYS has the burden of establishing by substantial evidence that an indicated report of child abuse is accurate. Bucks County Children and Youth Social Services Agency v. Department of Public Welfare, 808 A.2d 990 (Pa. Cmwlth. 2002).

On appeal, C.N. initially argues that J.N.'s testimony should have been stricken because it was tainted and not corroborated by any physical evidence. We observe that Pennsylvania specifically requires an examination of a child witness for competency. Commonwealth v.

[2] This court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings are supported by substantial evidence. J.G. v. Department of Public Welfare, 795 A.2d 1089 (Pa. Cmwlth. 2002).

Washington, 554 Pa. 559, 722 A.2d 643 (1998). The trial court's determination of competency will not be disturbed absent an abuse of discretion. Id.

In Commonwealth v. Delbridge, 578 Pa. 641, 855 A.2d 27 (2003), the Supreme Court stated that when an allegation of taint is alleged, the appropriate venue for an investigation into such a claim is a competency hearing.

> In order to trigger an investigation of competency on the issue of taint, the moving party must show some evidence of taint. Once some evidence of taint is presented, the competency hearing must be expanded to explore this specific question. During the hearing the party alleging taint bears the production of evidence of taint and the burden of persuasion to show taint by clear and convincing evidence. Pennsylvania has always maintained that since competency is the presumption, the moving party must carry the burden of overcoming that presumption.… [A]s with all questions of competency, the resolution of a taint challenge to the competency of a child witness is a matter addressed to the trial court.

Id. at 664-665, 855 A.2d at 40.

In this case, before the ALJ, counsel for C.N. argued that J.N.'s testimony should be stricken because J.N. was not competent to testify because he did not show a capacity to observe or perceive the occurrence with accuracy. (R.R. at 58a.) Counsel for C.N. also stated that he didn't believe that J.N. was comfortable to testify, that he was led to answer a question and that J.N.'s testimony was tainted. (Id.) Opposing counsel

countered that J.N.'s answers were responsive, that his testimony was clear and consistent and that the child was not being manipulated. (Id.)

The ALJ overruled the motion to strike. Counsel for C.N. argues to this court that the ALJ erred in concluding that J.N. was competent to testify and in not addressing the taint issue. (C.N.'s brief at p.10.) We disagree.

C.N. did not present any testimony that J.N. was influenced by interested adults or by suggestive, repetitive or coercive interview techniques. Commonwealth v. Moore, 980 A.2d 647 (Pa. Super. 2009), petition for allowance of appeal denied, __ Pa. __, 991 A.2d 311 (2010). Taint is defined as "the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child…." Delbridge, 578 Pa. at 663-664, 855 A.2d at 40. As previously stated, in order to trigger an investigation of competency on the issue of taint, the moving party must show some evidence of taint. "[T]aint is a matter properly examined during a competency determination as it goes to the question of whether the child has the memory capacity to retain an independent recollection of the occurrence." Delbridge, 578 Pa. at 663, 664, 855 A.2d at 34. Here, although C.N. alleged taint, he failed to produce evidence of taint.

C.N. next maintains that the ALJ erred in admitting the report prepared by the caseworker, arguing that it constitutes hearsay. Because such testimony was hearsay, it must be supported with admissible corroborated evidence to satisfy the burden of substantial evidence. B.E. v.

Department of Public Welfare, 654 A.2d 290 (Pa. Cmwlth. 1995). The testimony of a victim alone, however, constitutes substantial evidence to support an indicated report of child abuse. D.T. v. Department of Public Welfare, 873 A.2d 850 (Pa. Cmwlth. 2005). Here, J.N. testified about the abuse and the ALJ credited his testimony.

Next, C.N. argues that his due process rights were violated because J.N. did not know when the abuse occurred. At the hearing, J.N. testified that the abuse occurred in the middle of the night when he slept over at his grandparents' house. (R.R. at 57a.) Although J.N. did not know the date that the abuse occurred, such does not negate the determination by the ALJ, and adopted by the DPW that substantial evidence exits to support the indicated report of child abuse.

C.N. also argues that the ALJ, whose decision was adopted by the DPW, erred in not crediting his testimony and that of his mother. Witness and credibility determinations, however, are resolved by the fact finder and cannot be disturbed on appeal. D.T.

Finally, C.N. claims that clear and convincing evidence does not exist to support an indicated report of child abuse. As previously stated, however, the standard of proof required of the county agency to support an indicated report of child abuse is substantial evidence. A.O. v. Department of Public Welfare, 838 A.2d 35 (Pa. Cmwlth. 2003).

In accordance with the above, the decision of DPW is affirmed.

JIM FLAHERTY, Senior Judge

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O R D E R

Now, December 22, 2010, the order of the Department of Public Welfare, in the above-captioned matter, is affirmed.

JIM FLAHERTY, Senior Judge