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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 06/21/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

URSULA C. ROONEY,) No. 1 CA-UB 10-0139
)
Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
ARIZONA DEPARTMENT OF ECONOMIC) (Not for Publication -
SECURITY, an Agency,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
and)
)
ARIZONA DEPARTMENT OF ECONOMIC)
SECURITY, DIVISION OF)
DEVELOPMENTAL DISABILITY,)
)
Appellees.)
_____)

Appeal from the Arizona Department of Economic Security Appeals
Board

A.D.E.S. Appeals Board No. U-1083279-BR

The Honorable D. E. Birchett, Administrative Law Judge

AFFIRMED

Ursula C. Rooney Tempe
In Propria Persona

Thomas C. Horne, Attorney General Tucson
By Dawn R. Williams
Assistant Attorney General
Attorneys for Appellees

W I N T H R O P, Judge

¶1 The application for appeal submitted by Ursula C. Rooney ("Appellant") was granted by this court on July 29, 2010. Appellant argues that the evidence presented was sufficient to prove that she was eligible for services provided by the Arizona Department of Security, Division of Developmental Disabilities ("DDD"). Accordingly, Appellant argues that the Arizona Department of Security ("ADES") Appeals Board erred in affirming the determination of the administrative law judge ("the ALJ") denying her application for benefits. For the reasons discussed below, we affirm.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 Appellant was born in 1958, and has been a recipient of special services for the mentally handicapped for most of her life. Appellant currently resides in a condo in Arizona and applied for services from the DDD. Appellant indicated that she had a cognitive disability.² Although Appellant has never been

¹ Unless a statute has been revised in a manner material to our analysis, we cite its current version.

² Pursuant to Arizona Revised Statutes ("A.R.S.") section 36-551(13) (2009), cognitive disability is defined as "a condition that involves subaverage general intellectual functioning, that exists concurrently with deficits in adaptive behavior manifested before age eighteen and that is sometimes referred to as intellectual disability or mental retardation."

appointed a legal guardian, she executed a power of attorney naming her step-mother, sister, and brother as her agents.

¶13 In a decision dated August 28, 2008, DDD denied Appellant's application, stating that "[t]he available records do not document that [Appellant] has a [DDD] qualifying diagnosis of [c]ognitive [d]isability." After receiving the letter denying her eligibility, Appellant, through her sister/power of attorney, filed an appeal to ADES.

¶14 A hearing was held before the ALJ on December 11, 2008. Various exhibits were admitted by the ALJ. Amongst those exhibits were: 1) a report prepared in New York (where Appellant formerly resided) by school psychologist Julius Leopold in 1964 when Appellant was six years' old, in which he stated that intelligence tests revealed Appellant "to function on a retarded level" and referring Appellant to Dr. Charash for further examination; 2) a letter from Dr. Charash averring that he had examined Appellant in 1964 and "referred her to [the] Brain Injured class, due to positive neurologic findings," but noting that he no longer possessed Appellant's records; 3) a psychological evaluation conducted in Kansas (where Appellant also formerly resided) by Dr. Neufeld on July 20, 1979, with the test results placing her "in the borderline range of mental retardation" and a partial follow up report prepared by Dr.

Blessing confirming Dr. Neufeld's findings; 4) a letter dated January 16, 1980, from the Johnson County Mental Retardation Center in Kansas acknowledging that Appellant was their client, was diagnosed as having brain damage, and had "attended special schools in New York State" as well as a Kansas educational program "designed for handicapped persons;" 5) a statement of disability prepared by Dr. Christopher Panhallow in 1983 stating that Appellant suffered from "below average intellectual ability since birth" and noting that no improvement was expected; 6) a neuropsychological evaluation conducted by Dr. Nockleby in Arizona on April 18, 2001, stating that Appellant suffered from both mild situational depression and borderline to mild retardation; and 7) notarized statements signed by members of Appellant's family concerning Appellant's functional limitations in the major life areas, which is required to show that a claimant has a developmental disability.³ Of these exhibits, only Dr. Leopold's report and Dr. Charash's letter directly

³ Under § 36-551(18), a "[d]evelopmental disability" is a "severe, chronic, disability" that, amongst other things, results in "substantial functional limitations" in three or more areas of "major life activity." The areas of "major life activity" include: 1) self-care; 2) receptive and expressive language; 3) learning; 4) mobility; 5) self-direction; 6) capacity for independent living; and 7) economic self-sufficiency. *Id.* Further, the disability must be "[a]ttributable to cognitive disability, epilepsy, cerebral palsy or autism," must have "manifested before age eighteen," and must reflect a need for either lifelong or extended care or treatment. *Id.*

relate to examinations of Appellant made before the age of eighteen.

¶15 At the hearing, ADES called Dr. Klaehn, the medical director for DDD, and the ALJ qualified him as an expert witness. Dr. Klaehn testified that he was in charge of reviewing all grievances concerning denials of eligibility and had reviewed Appellant's record twice. His opinion was that Appellant did not meet the requirements set forth in § 36-551(18) to be classified as having a developmental disability, and specifically stated that Appellant failed to prove that she had a cognitive disability that manifested before she was eighteen and that she had substantial functional limitations in three or more areas of major life activity. Without a classification of developmental disability, Appellant was ineligible to receive DDD benefits.

¶16 Dr. Klaehn had reviewed all of the exhibits and based his opinion primarily on his review of the reports prepared by Dr. Nockleby, Dr. Neufeld, and Dr. Blessing. He testified that the preponderance of the evidence demonstrated that: Appellant only fell within the "borderline range" between average intellectual functioning and cognitive disability; any potential cognitive disability failed to manifest before Appellant had turned eighteen; the broad range, or "scatter," of Appellant's

sub-test IQ scores were inconsistent with a finding of cognitive disability; and any decrease in Appellant's test scores over time was likely due to a change in the test questions, not a decrease in Appellant's intelligence. He also pointed out that based on the information he had regarding Appellant's lifestyle - that she had held a long-term job for which she had been trained, used public transportation effectively, been married and divorced, managed portions of her personal finances, lived independently in a condo and with roommates, and had managed to obtain a driver's license in another state - he could not conclude that Appellant had a substantial functional limitation in three areas of major life activity. Dr. Klaehn also testified that Appellant's receipt of disability services in other states did not impact his opinion as each state defines eligibility for benefits under different standards. Finally, Dr. Klaehn admitted that he had not personally examined Appellant, but stated that such a personal examination was unnecessary for his determination as the reports on Appellant's condition were not contradictory.

¶17 Appellant's step-mother and Appellant both testified on Appellant's behalf. Almost all of their testimony was limited to statements about Appellant's childhood, current lifestyle, and her mental limitations and capabilities.

¶18 On January 15, 2009, the ALJ issued his decision denying Appellant's application for benefits. The ALJ concluded that "[w]hile it is evident that there are deficiencies, that alone does not establish eligibility for services under the Developmental Disabilities program[,] [s]uch eligibility is limited to very specific criteria[,] [t]he evidence in this case is insufficient to meet such criteria." The ALJ noted that the evidence did "not support the qualifying diagnosis of cognitive disability" and, further, that the evidence failed to show that any potential cognitive disability "existed or was evident prior to the age of eighteen." On both petitions for review, the ADES Appeals Board affirmed the ALJ's decision. Appellant timely filed an application for appeal to this court, which we granted.

¶19 We have jurisdiction pursuant to A.R.S. § 41-1993(B) (Supp. 2010).

DISCUSSION

¶10 On Appeal, Appellant argues that the ALJ incorrectly found that she failed to demonstrate that her cognitive disability resulted in substantial functional limitations in at least three of the areas of major life activity as required by § 36-551(18)(d). Appellant also contends that the evidence presented was sufficient to show that Appellant's cognitive disability had manifested before the age of eighteen. On

appeal, we are bound by the findings of fact of the Appeals Board unless the findings "are arbitrary, capricious, or an abuse of discretion," but we may draw our own legal conclusions. *Munguia v. Dep't of Econ. Sec.*, 159 Ariz. 157, 158-59, 765 P.2d 559, 560-61 (App. 1988) (citations omitted). Further, we will affirm the Appeals Board's decision if it is supported by substantial evidence. *Id.*

¶11 In order to be eligible to receive disability services, Appellant was required to prove that she was a resident of Arizona (which is not at issue on appeal) and that she was developmentally disabled. See A.R.S. 36-559(A); Ariz. Admin. Code R6-6-301(A). Appellant was required to "provide[] medical and psychological documentation of such developmental disability utilizing tests which are culturally appropriate and valid." A.R.S. § 36-559(A)(2). As discussed in footnote 3 above, Appellant's developmental disability must be a result of a mental impairment (in this case, cognitive disability) and such disability must result in substantial functional limitations in three or more areas of major life activity for which treatment is required.⁴ See A.R.S. 36-551(18); A.A.C. R6-6-302.

⁴ A "[s]ubstantial functional limitation" is defined as "a limitation so severe that extraordinary assistance from other people, programs, services or mechanical devices is required to

¶12 Appellant failed to persuade the ALJ that she either was developmentally disabled as a result of a cognitive disability or, to the extent that she had a developmental disability, that it resulted in substantial fundamental limitations in at least three areas of major life activity. See, e.g., *Keovorabouth v. Indus. Comm'n of Ariz.*, 222 Ariz. 378, 380-81, ¶ 7, 214 P.3d 1019, 1021-22 (App. 2009) (discussing a workers' compensation claim and noting that "It is the claimant's burden to prove all elements of a compensable claim" including both legal and medical causation (citations omitted)). Under § 36-559(A)(2), Appellant was required to provide medical and psychological documentation of her developmental disability. Although three psychological evaluations were submitted for consideration, the only expert who testified regarding the findings in these evaluations was ADES' expert Dr. Klaehn, who concluded that the evaluations were insufficient to prove that Appellant had a cognitive disability as defined by Arizona law. Appellant provided no direct expert testimony to refute Dr. Klaehn's interpretations and conclusions.

¶13 Further, Appellant failed to submit any substantial evidence, outside of her own testimony and the testimony and

assist the person in performing appropriate major life activities." A.R.S. § 36-551(41).

statements of her family, that her disability resulted in substantial fundamental limitations in at least three areas of major life activity. Dr. Klaehn specifically testified that Appellant was not limited in three areas of major life activity. His opinion was supported by evidence of Appellant's ability to engage in most areas of major life activity, such as riding the bus to her job and living in her own condo, to a level above that contemplated in § 36-551(41). See also A.A.C. R6-6-302(B). To the extent there was a conflict in the evidence, it was for the ALJ to resolve. Accordingly, we find that the decision of the ALJ and Appeals Board were supported by substantial evidence, and affirm their denial of Appellant's application for disability benefits.⁵

⁵ We note, however, that evidence was presented to suggest that Appellant had a developmental disability that manifested before the age of eighteen. Appellant submitted a psychologist's report that, at age six, Appellant's intelligence test scores showed her "to function on a retarded level." Further, Appellant's former neurologist furnished a letter stating that when he examined Appellant at that age, he classified her as "Brain Injured." Appellant provided evidence that she was considered "brain damaged" by the Johnson County Mental Retardation Center as late as 1980. In 1983, Dr. Panhallow noted that Appellant's intellectual ability had been below average "since birth." We note that § 36-551(13) recognizes both "intellectual disability or mental retardation" as terms indicative of "cognitive disability." Nonetheless, the ALJ determined that he was unable to find Appellant had a cognitive impairment prior to the age of eighteen, and the Appeals Board similarly stated that "[n]o records prior to the age of eighteen were submitted into evidence." We therefore find that the ALJ and Appeals Board abused their discretion in

¶14 Finally, Appellant argues that, at a minimum, Dr. Klaehn's testimony should have been given less weight because he did not interview Appellant in her home environment and because the reports he relied on also did not reflect Appellant's behavior in her home environment. We note that Appellant has not pointed to any ADES or DDD policy that requires its employees to observe claimants for disability benefits in their home environment or conduct personal interviews with them, and Dr. Klaehn testified that such examinations are not standard practice at the DDD. Further, there is no reason to believe that the ALJ and the Appeals Board failed to consider Appellant's arguments and evidence regarding Appellant's limitations in her home environment. In fact, the Appeals Board even acknowledged that the benefits of DDD services in Appellant's case are "both obvious and uncontested." The fact remains, however, that Appellant failed to meet the eligibility requirements set forth by statute and administrative code to receive such services. Accordingly, our analysis is not changed by the fact that Dr. Klaehn had not personally observed Appellant in her home environment or that the reports he relied

finding that Appellant failed to prove that her developmental disability manifested prior to the age of eighteen when the record contained satisfactory evidence of such a manifestation.

upon were not based on evaluations rendered in Appellant's home environment.

CONCLUSION

¶15 For the reasons set forth above, we affirm the ADES Review Board's decision affirming the ALJ's denial of Appellant's application for services.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
MAURICE PORTLEY, Presiding Judge

_____/S/_____
ROGER BRODMAN, Judge*

*Pursuant to Article VI, Section 3 of the Arizona Constitution, the Arizona Supreme Court designated the Honorable Roger Brodman, Judge of the Arizona Superior Court, to sit in this matter.