

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

S.B.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 106 C.D. 2011
	:	SUBMITTED: July 1, 2011
Department of Public Welfare,	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: August 23, 2011

S.B. (Petitioner) petitions this court for review of the order of the Department of Public Welfare (Department) that adopted the recommendation of the Administrative Law Judge (ALJ) and denied Petitioner’s request to expunge the indicated report of child abuse filed against him pursuant to the Child Protective Services Law (Law).¹ After review, we affirm.

On January 28, 2010, Fayette County Children and Youth Services (Fayette CYS) received a report of suspected sexual abuse involving L.F. The report was called in to the ChildLine and Abuse Registry, which in turn, notified Fayette CYS the same day. Caseworker Shawn Murray, assigned to investigate the

¹ 23 Pa. C.S. §§ 6301-6386.

report, requested a courtesy interview from Washington County CYs, where the child, L.F., resided, and also arranged a forensic interview at A Child's Place at Mercy.² Murray interviewed Petitioner, who denied the allegations. Following Murray's investigation, on March 28, 2010, Fayette CYs filed a Child Protective Services Investigation Report (CY-48) that was Indicated for Sexual Abuse against L.F., naming Petitioner as the perpetrator.³ Petitioner was sent a copy of the report and notified that he was listed on the statewide registry of child abuse as a perpetrator in an indicated report of child abuse.⁴ Petitioner then filed a request with ChildLine to have the record expunged, which was denied. Petitioner filed a timely appeal with the Bureau of Hearings and Appeals (Bureau) from this decision and a hearing was conducted on August 26, 2010.

The facts as found by the ALJ are as follows. L.F. was at a get-together at her grandmother's house a few years ago where she was given permission by her mother, S.H., to go with Petitioner to his house to check on his

² Because L.F. was interviewed by Washington County CYs and A Child's Place at Mercy, Murray himself did not conduct another interview of L.F.

³ 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 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.

Section 6303(a) of the Law, 23 Pa. C.S. §6303(a).

⁴ Section 6341(a)(2) of the Law, 23 Pa. C.S. §6341(a)(2), states, in pertinent part that:

Any person named as a perpetrator . . . in an indicated report of child abuse may, within 45 days of being notified of the status of the report, request the secretary to amend or expunge an indicated report on the grounds that it is inaccurate or it is being maintained in a manner inconsistent with this chapter.

Petitioner asserts that the indicated report is inaccurate.

son, St.B. Petitioner drove L.F. to his house in his truck. Once at his home, Petitioner and L.F. went inside and while St.B. was downstairs, Petitioner began to take off L.F.'s clothes. At the time, Petitioner and L.F. were alone in Petitioner's bedroom. Petitioner made L.F. kiss his "thing" which L.F. identified as his "private." Petitioner also took his clothes off, and after L.F. kissed his "thing," he made L.F. get on top of him and kiss him on his mouth. At this point, L.F.'s mother phoned Petitioner and the alleged abuse stopped and L.F. put her clothes back on. L.F. was too afraid to call out to anyone during the abuse. Petitioner took L.F. back to her grandmother's house and L.F. later told her mother what happened.

St.B. remembered that he was downstairs playing games when his father and L.F. came into the house one afternoon. St.B. stated that his father's bedroom was upstairs, and that he could not see what was going on upstairs while he was downstairs. Petitioner then testified that he remembered the event as occurring around two years earlier, or September of 2008, and that he had formerly been good friends with B.R., S.H.'s former husband and L.F.'s stepfather. Petitioner stated that he and L.F. went to his house to check on his son and that he immediately came back with L.F. Petitioner could think of no altercation or other provocation for L.F. to make up the story and guessed that the only reason she would do so is for attention.

The ALJ rejected Petitioner's testimony as not credible and concluded that his actions clearly constituted sexual abuse and exploitation under Section 6303(a) of the Law, 23 Pa. C.S. §6303(a). The ALJ accepted the testimony of the child victim, L.F., as consistent and credible. The ALJ recommended that Petitioner's appeal be denied. The Bureau adopted the recommendation of the

Hearing Examiner and ordered that Petitioner's request to expunge the indicated report of sexual abuse be denied. Petitioner's petition for review is now before this court for consideration.⁵

On appeal from a refusal to expunge an indicated report, the County Child Protective Service Agency has the burden of establishing that the report is accurate by substantial evidence. *G.S. v. Dep't. of Pub. Welfare*, 521 A.2d 87 (Pa. Cmwlth. 1987). Thus, Fayette CYC was required to prove that Petitioner's actions constituted child abuse within the meaning of the statute. *D.T. v. Dep't. of Pub. Welfare*, 873 A.2d 850 (Pa. Cmwlth. 2005). Substantial evidence in the context of a child abuse proceeding has been defined as evidence which outweighs inconsistent evidence and which a reasonable person would accept as adequate to support a conclusion. *L.S. v. Dep't. of Pub. Welfare*, 828 A.2d 480 (Pa. Cmwlth. 2003). Findings based upon speculation, assumption or hearsay rather than substantial evidence of record will not be upheld. *See R.P. v. Dep't. of Pub. Welfare*, 820 A.2d 882 (Pa. Cmwlth. 2003). Finally, the Bureau is the ultimate fact finder. *D.T.*

Petitioner argues that the Bureau erred in finding that his actions in having the minor child L.F. take her clothes off and kiss his penis constituted child abuse under the Law, and in finding that he was a "perpetrator" as that term is used in Section 6303 of the Law. Child abuse is defined in Section 6303(b)(1)(ii) of the Law, 23 Pa. C.S. §6303(b)(1)(ii) to include:

⁵ Fayette County CYC filed a Notice of Intervention with the court. The Department thereafter notified this court that it did not intend to participate nor file a brief in this matter.

[a]n act or failure to act by a perpetrator which causes nonaccidental serious mental injury to or sexual abuse or sexual exploitation of a child under 18 years of age.

The Law further defines the terms “sexual abuse or sexual exploitation” to include:

[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).

Petitioner argues that the ALJ’s conclusion that his actions constituted child abuse under the Law is not supported by any evidence. He challenges the ALJ’s acceptance of L.F.’s testimony as credible and avers that he and his son’s testimony was more credible. While L.F. was not sure of the exact date or how old she was, in other respects, L.F.’s testimony was consistent with that given in her previous interviews with CYS caseworkers. The ALJ found that L.F. had no motive to lie or fabricate the story and that the “child’s testimony was clear, and convincing.” *Id.* at 7.

Petitioner’s arguments are nothing more than an impermissible attack on the credibility determinations of the factfinder. It is the factfinder’s job to resolve conflicts in the testimony and to determine the weight to be assigned the evidence. *Bucks County C.Y.S.S. v. Dep’t. of Pub. Welfare*, 616 A.2d 170 (Pa. Cmwlth. 1992). Credibility determinations cannot be disturbed on appeal. *D.T. v. Dep’t. of Pub. Welfare*, 873 A.2d 850 (Pa. Cmwlth. 2005). Although there was no medical evidence presented to substantiate the abuse and there was no admission of abuse by the perpetrator, Petitioner, the testimony of the child victim alone may constitute substantial evidence to support an indicated report of child abuse. *D.T.; G.S. v. Dep’t. of Pub. Welfare*, 521 A.2d 87 (Pa. Cmwlth. 1987). Here, the ALJ concluded that the “admissible, consistent, and credible testimony of the subject

child here more than carries the day and is entirely supportive of the Child Protective Service Investigation Report.” Adjudication at 7. Accordingly, L.F.’s testimony accepted by the ALJ constitutes substantial evidence to support the finding that Petitioner’s actions constituted child abuse under the Law.⁶

Next, Petitioner argues that the ALJ erred in finding that he was a “perpetrator” under the Law, because in order to make that determination, he had to have committed child abuse *and* be *either a parent of the child, responsible for her welfare, living in the same home as the child, or a paramour of the child’s parent*, 23 Pa. C.S. §6303(a), and both requirements must be met in order for him to be considered a “perpetrator” under that section. Fayette CYC counters that by virtue of L.F.’s mother giving Petitioner permission to take L.F. with him to check on his son, Petitioner was “responsible for the welfare of” L.F. We agree.

It is undisputed that Petitioner is not the parent of L.F., that he does not reside in the same home as L.F., and that he is not a paramour of L.F.’s parent. Therefore, having concluded that Petitioner committed child abuse, the question of whether Petitioner is a “perpetrator” under the Law is dependent on whether he is a “person responsible for the welfare of a child,” here, L.F. Section 6303(a) of the Law defines “person responsible for the child’s welfare” as:

[a] person who provides permanent or temporary care, supervision, mental health diagnosis or treatment, training or control of a child in lieu of parental care,

⁶ Petitioner also argues that the ALJ impermissibly shifted the burden of proof to him to provide a motive for L.F. to lie in order to prove his own credibility. When the ALJ asked Petitioner what motive or reason L.F. would have to make up the story of sexual abuse, Petitioner answered that he did not know, but speculated that maybe L.F. lied to seek attention. Petitioner’s argument is nothing more than an attack on the credibility determinations of the ALJ, which we are not permitted to disturb on appeal. *D.T.*

supervision and control. The term does not include a person who is employed by or provides services or programs in any public or private school, intermediate unit or area vocational-technical school.

23 Pa. C.S. §6303(a). Petitioner avers that driving L.F. to and from his home to check on his son, a trip of no more than ten minutes, does not mean that he was providing care or supervision to L.F. or that he had authority over her, as he would if he were L.F.’s babysitter, citing *Commonwealth v. Gerstner*, 540 Pa. 116, 656 A.2d 108 (1995).⁷ Petitioner asserts that he was merely someone who had a child accompany him on a brief car ride, and that is not enough to confer upon him the responsibility for her welfare under Section 6303 of the Law. According to Petitioner, he was neither given nor accepted responsibility for L.F.’s welfare so he cannot be considered a “person responsible for the welfare of a child” under Section 6303(a) of the Law.⁸

The Law defines a “person responsible for the child’s welfare” as “a person who provides permanent *or temporary* care, supervision . . . or control of a

⁷ In that case, Gerstner had provided babysitting services to two minor children and was arrested and charged with indecent assault and corruption of minors after the statute of limitations had run. Arguing that the tolling provisions of 42 Pa. C.S. §5554(3) applied, the Commonwealth appealed the trial court’s grant of Gerstner’s motion to dismiss. That section provided that the period of limitation would not run when “a child is under 18 . . . where the crime involves injury to the person of the child caused by the wrongful act, or neglect, or unlawful violence, or negligence of the child’s parents *or by a person responsible for the child’s welfare . . .*” *Id.* (emphasis added). The Supreme Court held that for purposes of that statute, the phrase, “‘person responsible for the child’s welfare’ includes any individual who is entrusted with custody and control of the child during a parent’s absence,” *Gerstner*, 540 Pa. at 128, 656 A.2d at 114 (1995), and since Gerstner fell within this category, the statute of limitations had not run.

⁸ As Petitioner notes, under Section 6303(a) of the Law, 23 Pa. C.S. §6303(a), a “perpetrator” is defined as “[a] person who has committed child abuse and is a parent of a child, a person responsible for the welfare of a child, an individual residing in the same home as a child or a paramour of a child’s parent.”

child in lieu of parental care, supervision and control.” 23 Pa. C.S. §6303(a) (emphasis added). In the case *sub judice*, Petitioner was given permission to temporarily supervise and take care of L.F., a minor child, by her mother, S.H., when he took her with him to check on his son. As he was the only adult present on the ride from the grandmother’s house to his house, it is clear that he was the person responsible for L.F.’s welfare and, therefore, under these facts we conclude that he falls within the statutory definition of Section 6303(a), 23 Pa. C.S. §6303(a).

Accordingly, the order of the Department of Public Welfare, Bureau of Hearings and Appeals is affirmed.

BONNIE BRIGANCE LEADBETTER,
President Judge

