

report³ of child abuse⁴ naming T.A. as a perpetrator.⁵ CYS argues that DPW erred by rejecting the alleged child victim’s testimony as not credible based upon the

reports for investigation and maintains the reports in the appropriate file. . . .” 55 Pa. Code § 3490.4.

³ Section 6303(a) of the Law defines an “indicated report” 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.

23 Pa. C.S. § 6303(a).

⁴ Section 6303(b)(1) of the Law defines “child abuse”, in pertinent part, as follows:

- (1) The term “**child abuse**” shall mean any of the following:
...
 - (ii) An act or failure to act by a perpetrator which causes nonaccidental . . . sexual abuse or sexual exploitation of a child under 18 years of age.
 - (iii) Any recent act, failure to act or series of such acts 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)(1)(ii), (iii).

⁵ Section 6303(a) of the Law, in pertinent part, defines “**perpetrator**” 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.” 23 Pa. C.S. § 6303(a).

child's demeanor. Because it is beyond this Court's scope of review to reweigh the evidence or disturb credibility determinations on appeal, we must affirm.⁶

On November 15, 2010, CYS received a referral that G.C., a female child born on September 4, 2005, disclosed that T.A., the paramour of G.C.'s biological mother, inappropriately touched her and her twin sister "in their 'no-no' spot" when they were between 3 and 5 years old. (Protective Services Investigation Report, R.R. at 13a.) Upon receiving the referral, CYS conducted an investigation regarding the alleged sexual abuse. On December 13, 2010, CYS filed an indicated report of child abuse naming T.A. as the perpetrator. On December 21, 2010, DPW, through its Office of Children, Youth and Families, notified T.A. that he was listed as a perpetrator in an indicated report and that, if he disagreed with this report, he must request a review or hearing within forty-five days. On January 5, 2011, through counsel, T.A. requested an official review of the indicated status and, on March 1, 2011, T.A. requested an expungement hearing before the BHA. (Letter from DPW to T.A. (December 21, 2010) at 1, R.R. at 7a; Letter from T.A. to DPW (January 5, 2011) at 1, R.R. at 8a; Letter from T.A. to DPW (March 1, 2011) at 1, R.R. at 10a.)

An expungement hearing was conducted before the ALJ on June 10, 2011 at which G.C., Kelly Flaherty (Caseworker), and T.A. testified. G.C. testified that T.A. touched her "no-no spot" once when she had her clothes on, and identified it by pointing to her vaginal area. (Hr'g Tr. at 15-18, R.R. at 48a-51a.) G.C. stated that she did not know when this happened, but stated that she was at home, her

⁶ By notice filed with this Court on December 15, 2011, T.A. intervened in this matter.

sister was sleeping, and another sister and her mother were at school. (Hr'g Tr. at 19-20, R.R. at 52a-53a.) Caseworker testified that she interviewed G.C.'s mother, who had been the paramour of T.A., and her three children at their home. (Hr'g Tr. at 25, R.R. at 58a.) Caseworker stated that the investigation included the children being seen at the Children's Advocacy Center and T.A. meeting with law enforcement. (Hr'g Tr. at 27, R.R. at 60a.) Caseworker testified that G.C. told her that T.A. touched "her no-no spot" two times and that G.C. believed it was in the morning because she was still in her pajamas, that it was snowing and her mother was in school. (Hr'g Tr. at 28-30, R.R. at 61a-63a.) Caseworker acknowledged that she was aware that G.C.'s mother attended only summer school. (Hr'g Tr. at 30, R.R. at 63a.) Caseworker listed the incident on the indicated report as having occurred between the two-year period from November 2008 through November 2010 because that was the time period when T.A. was in a relationship with G.C.'s biological mother. (Hr'g Tr. at 29, R.R. at 62a.)

T.A. testified that he had lived with G.C.'s mother on and off beginning in November 2008. (Hr'g Tr. at 44, R.R. at 77a.) T.A. testified that B., the father of G.C. and the separated spouse of G.C.'s biological mother, accused him of having an affair with G.C.'s mother, and B. threatened his life and his family's safety. (Hr'g Tr. at 44, R.R. at 77a.) T.A. testified that after he accompanied G.C.'s mother in her custody matter against B., B.'s niece filed an accusation against him (T.A.) on the following Friday. (Hr'g Tr. at 44, R.R. at 77a.) T.A. stated that after G.C.'s mother accompanied him to his preliminary hearing in the matter regarding B.'s niece, from which he was exonerated of all charges by a jury, B. then made the allegation that is the subject of the present case. (Hr'g Tr. at 43-45, R.R. at

76a-78a.) T.A. testified that he was never alone with G.C. in the more than two years that he stayed with her mother and he believed that G.C.'s father, B., who had threatened to do whatever it took to keep T.A. away, was behind this, adding that the first case began on the day B. left jail. (Hr'g Tr. at 48-49, R.R. at 81a-82a.)

On October 17, 2011, the ALJ issued an Adjudication in which she found T.A.'s testimony credible and found G.C.'s testimony not credible. The ALJ credited T.A.'s testimony because he "testified clearly and concisely" and "[h]is body language and his demeanor . . . strengthened his credibility." (Adjudication at 8.) The ALJ explained why she did not credit G.C. as follows:

Although it is not uncommon for children to be less than forthright when initially asked about abuse or to be confused as to the exact date, the discrepancies in the important details of the incident are too great to overlook. More importantly, G.C.[] due to her young age, did not appear to be coached, but testified in a confused and unsure manner. Since there is no medical evidence in this case, the CYS must rely solely on the testimony of the subject child, who was unsure where the alleged abuse occurred, when it occurred and who was present. Although [Caseworker] was credible, the child's testimony was simply too inconsistent to allow this presiding [ALJ] to find that the CYS has met its burden.

(Adjudication at 8.) As a result, the ALJ recommended that T.A.'s appeal be sustained and T.A.'s name expunged from the ChildLine Registry. On October 17, 2011, the BHA issued an Order adopting the ALJ's Recommendation in its entirety. On November 16, 2011, CYS filed a Petition for Review with this Court.

In its brief, CYS argues that it met its burden of establishing sexual abuse by substantial evidence,⁷ contending that DPW erred by equating G.C.’s confused and unsure manner consistent with her young age with a lack of credibility.

It is well-settled that “the weight and credibility of the evidence [are] solely within the discretion of the BHA as factfinder.” J.M., In Re I.M. v. Department of Public Welfare, 52 A.3d 552, 554 n.6 (Pa. Cmwlth. 2012). Here, the ALJ credited the testimony of T.A. and did not credit the testimony of G.C., in large part because of the inconsistencies in G.C.’s testimony and discrepancies regarding important details of the incident.⁸ The ALJ took into account that it is not uncommon for young children to be confused and unsure, and explained the basis for the credibility determination; there was, therefore, no abuse of discretion. It is

⁷ Although “substantial evidence must support a determination of whether child abuse has occurred” . . . “there must be clear and convincing evidence of child abuse to maintain statutorily-designated information from an indicated report on the ChildLine Registry.” G.V. v. Department of Public Welfare, 52 A.3d 434, 446 (Pa. Cmwlth. 2012) (emphasis omitted).

⁸ The ALJ stated the following, in pertinent part:

The issue here becomes one of credibility. The subject child, G.C., told [CYS] that T.A. touched her “no-no” spot on two occasions. In addition, during the interview, G.C. claimed that her sister was in the closet during the alleged abuse. At the hearing, G.C. pointed to her vaginal area as her “no-no” spot and stated that T.A. touched her on only one occasion. Moreover, G.C. testified that her twin sister was upstairs sleeping and not in the closet when the alleged abuse occurred. The CYS reported the alleged sexual abuse dated back [to] when G.C. would have been approximately three years old. Based upon G.C.’s young age at the time the alleged abuse occurred, the inconsistencies in her interview and her testimony and the lack of any additional corroborative evidence, I find that G.C. was not credible.

(Adjudication at 8.)

not this Court's role to reweigh the evidence or make credibility determinations that are within the province of the fact finder under these circumstances. Because the ALJ did not credit the testimony regarding the abuse, there was no evidence to support a determination that child abuse occurred.

Accordingly, we affirm.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Luzerne County Children and Youth Services,	:	
	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2130 C.D. 2011
	:	
Department of Public Welfare,	:	
	:	
	:	
Respondent	:	

ORDER

NOW, January 24, 2013, the Order of the Department of Public Welfare, Bureau of Hearings and Appeals, entered in the above-captioned matter is hereby affirmed.

RENÉE COHN JUBELIRER, Judge