IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

COSSETTA STROUD, Petitioner, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	No. 40391-9-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Cossetta Stroud appeals a Department of Social and Health Services (DSHS) Board of Appeals (Board) December 30, 2004 final order, issued at the conclusion of her father's challenge to DSHS terminating her independent provider (IP) contract. Stroud assigns error to the DSHS Board's reviewing judge (1) assuming original jurisdiction, rather than appellate jurisdiction; (2) evaluating the evidence under the preponderance of the evidence standard; (3) reversing the administrative law judge's (ALJ) findings of fact which were supported by substantial evidence; (4) treating the ALJ's credibility findings as a presumption subject to rebuttal by preponderance of the evidence; and (5) applying the 2003 amendments to former RCW 74.34.020(9) (1999) retroactively. Stroud further assigns error to the trial court admitting additional evidence into the record on review and denying Stroud's request for attorney

fees for her "successful reversal" of a different final order. Stroud asserts that she is entitled to back pay for the services she continued to provide her father after DSHS terminated her contract.

Because substantial evidence supports the reviewing judge's December 30, 2004 findings of fact and the reviewing judge's legal conclusions were proper, we affirm the Board's decision. We hold Stroud is not entitled to back pay or attorney fees.

FACTS

John Stroud suffered from Huntington's disease. In 1998, John[1] moved from California to live with his daughter, Stroud, in Olympia, Washington. He received Medicaid services provided by DSHS. Under the Community Options Program Entry System (COPES) program, Stroud acted as both John's care provider and attorney-in-fact. Stroud's IP contract with DSHS provided compensation for 184 hours of monthly care for John.

On December 16, 2002, John's DSHS case manager visited the Stroud residence to conduct an annual comprehensive assessment. John deferred to Stroud to answer most of the questions but remained present or nearby during the visit. Stroud informed the case manager that although John remained able to walk, he had experienced an increase in confusion and in the number of times he fell during the past year. John did not have a wheelchair but used a wheeled walker. John also suffered frequent coughing spells and remained at high risk of liquid and food aspiration.

Due to John's increasing need for care, DSHS sought an exception to allocate 48 additional paid hours of caregiving for John. The case manager concluded, "[I]t is not safe or appropriate for [John] to be left alone due to multiple health and safety risks." Clerk's Papers

[1] For clarity, we refer to Stroud's father by his first name, John. We intend no disrespect.

(CP) at 49. The case manager informed Stroud that John was not to be left alone, even for brief periods, and that Stroud would be responsible for all times that another COPES provider was not present. In light of the new 24-hour care requirement, DSHS did not reauthorize John's Lifeline Emergency Response Unit[2] device.

On December 16, DSHS drafted a new service plan to guide John's caregivers. The plan reiterated that John was never to be left alone. Stroud signed the plan on January 23, 2003, after DSHS denied her request to remove the requirement that John always be attended. DSHS relied on its own interpretation of notes written by Nancy Schuman, a University of Washington Medical Center ARNP, that a caregiver must be in the home within visual or hearing distance of John at all times. Schuman later stated that she intended her notes to reflect her belief that a caregiver should be present only while John ate; she had no opinion as to whether a caregiver was required at all other times.

During the same time period, two anonymous sources—a medical professional and a social worker—contacted Adult Protective Services (APS) to report that Stroud had neglected John by leaving him alone in the house, showed no concern when he had serious coughing episodes, and failed to assist him when he fell. On December 17, 2002, APS investigator Mary Galvez visited the Stroud residence and found John alone in his bed. Stroud, by telephone, and John asked Galvez to leave the residence, which she did after waiting 45 minutes for a neighbor to arrive and stay with John.

Galvez interviewed John's primary physician, Dr. James Edstam, three registered nurses,

[2] A Lifeline Emergency Response Unit, typically worn around the neck or on the wrist, is a personal medical alert device. A person immobilized because of a fall or other medical emergency pushes a button on the device to activate an emergency medical response service.

three social workers, and three of John's other COPES IPs. Edstam opined that John could be alone as long as he had access to and could use a Lifeline device. The three registered nurses opined that John should never be alone. Two of the social workers agreed with the nurses, but one, Catherine Kendall, MSW, LICSW, stated that Huntington's disease patients could be alone for brief periods of time and, particularly, John could be left on his own safely if he had a functional wheelchair and was able to use a Lifeline device.

Galvez reported that leaving John alone put him at great risk of injury. Galvez noted that at least three IPs had quit and refused to provide care for John because Stroud had asked them to leave John alone in the residence. Galvez concluded that John "being left alone in [Stroud's] home for any period of time greater than an (sic) few minutes meets the legal definition of neglect." CP at 54. On March 4, 2003, DSHS issued a planned action notice notifying John of its intention to terminate Stroud as one of his IPs, effective March 22.

Stroud, acting as John's power of attorney, requested an administrative hearing to contest the APS neglect finding and Stroud's contract termination. The ALJ stayed DSHS's proposed termination and held hearings on March 14, April 2, and April 3. The ALJ issued an initial decision on May 13, finding that Stroud's conduct did not amount to neglect and reversed DSHS's termination of Stroud's IP contract. DSHS appealed and, on July 16, the Board[3] issued a review decision and final order concluding that although substantial evidence supported the ALJ's findings, the ALJ committed an error of law because it had no authority to consider the validity of the APS neglect finding in issuing an initial decision regarding DSHS's contract

[3] The DSHS's hearing rules, chapter 388-02 WAC, refer to the "Board of Appeals" as the "review judge." We use the two terms interchangeably.

termination. The Board accordingly reversed the initial decision and terminated Stroud's contract.

John appealed to the Thurston County Superior Court, which reversed the Board on August 27, 2004. The superior court found that the ALJ could consider APS's neglect finding as evidence and remanded with instructions that the Board determine (1) whether Stroud's conduct amounted to neglect and (2) whether DSHS appropriately terminated Stroud's IP contract under one or more of its alleged grounds.

John passed away on October 18. On December 30, the Board issued a review decision and final order upholding the APS neglect finding and DSHS's subsequent termination of Stroud's contract. The Board's reviewing judge found that the ALJ based his initial decision on two erroneous assumptions. Former WAC 388-02-0600(2)(c) (2002). First, the ALJ assumed that DSHS did not have authority to make Stroud responsible for John's care 24 hours per day. The reviewing judge found this assumption erroneous because Stroud, although a paid IP, was also a "person with a duty of care" under WAC 388-71-0105.[4] The reviewing judge concluded that because Stroud owed a duty of care to John 24 hours a day, the ALJ erred in finding that DSHS had attempted to impose a duty that did not already exist in the law.

Second, the reviewing judge concluded that the ALJ erred when he assumed DSHS was required to prove actual harm, or negative effect, to prove neglect. Former RCW 74.34.020(9)(a) (1999) defined "neglect" as "a pattern of conduct or inaction by a person or entity with a duty of care to provide the goods and services that maintain physical or mental health of a vulnerable

[4] WAC 388-71-0105 provides that a "person or entity with a duty of care" includes an attorney-in-fact or a person providing basic necessities of life to a vulnerable adult where the person volunteers or is employed on behalf of the vulnerable adult.

adult, or that avoids or prevents physical or mental harm or pain to a vulnerable adult." Finding this definition ambiguous, the reviewing judge applied a clarifying 2003 amendment[5] of the statute to conclude that DSHS was not required to prove actual harm but only a pattern of conduct or inaction by Stroud that failed to provide the goods and services that maintain physical or mental health of a vulnerable adult.

The reviewing judge found Kendall's testimony, which the ALJ heavily relied on, unpersuasive. The reviewing judge also found that there was "a great deal of evidence in the record to support [DSHS's] recommendation for constant supervision," particularly related to John's high risk of choking or falling. Administrative Record (AR) at 225. Then, based on the preponderance of the evidence in the record, the reviewing judge concluded "that 24 hour supervision is a service that maintains the health of [John]" and that evidence in the record supported DSHS's plan. AR at 228. The reviewing judge also concluded, again based on the preponderance of the evidence, that the record supported a finding that Stroud left John alone, contrary to the plan and her duty of care under WAC 388-71-0105. Accordingly, the reviewing judge concluded that DSHS met its burden to prove Stroud exhibited a pattern of conduct of leaving John alone satisfying the definition of neglect in former RCW 74.34.020(9)(a) (1999).

Stroud, still acting as John's power-of-attorney, appealed again to the superior court. The

[5] The 2003 amendment, which added four words to the definition of neglect, is as follows:

> (a) a pattern of conduct or inaction by a person or entity with a duty of care *that fails* to provide the goods and services that maintain physical or mental health of a vulnerable adult, or that *fails to* avoid or prevent physical or mental harm or pain to a vulnerable adult; or (b) an act or omission that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety.

Former RCW 74.34.020(9) (2003) (emphasis added).

superior court dismissed the appeal on August 12, 2005, as moot in light of John's death and because it found that Stroud lacked standing to pursue judicial review of her father's appeal. Meanwhile, on June 23, 2004, Stroud had filed a request for an administrative proceeding under her own name to challenge the APS neglect finding and DSHS's use of that finding as a basis for termination. Initially, the ALJ relied on the August 12 superior court order dismissing John's appeal to dismiss Stroud's appeal for lack of standing but the superior court later found she had standing to appeal in her own name and remanded.

On September 16, 2005, the superior court noted that the administrative records of Stroud's individual appeal and of John's appeal were consolidated for review. It appears that because both John's and Stroud's appeals were based on identical facts, the parties agreed to consolidate the records for efficiency. In other words, the consolidation allowed the parties to proceed with Stroud's appeal without having to hear witness testimony already given during the 2003 hearings held in John's appeal.

On September 26, 2005, Stroud requested that DSHS reinstate her hearing to appeal the December 30, 2004 final order because the neglect finding affected her ability to find adequate employment. On February 27, 2006, the ALJ found Stroud's request untimely and granted DSHS's motion to dismiss for lack of subject matter jurisdiction. The Board affirmed on May 23.

On June 20, Stroud petitioned for judicial review of the consolidated administrative records regarding the APS neglect finding. On April 17, 2009, following lengthy proceedings on other matters, the superior court limited its review of the December 30, 2004 final order to the APS neglect finding and contract termination issues. DSHS moved to dismiss, arguing that Stroud lacked standing as a COPES provider to contest the termination of her IP contract, or,

alternatively, even if she had standing, she had made no claim on which relief could be granted.

In support of its motion, DSHS attached a declaration of Carol Sloan, an APS program manager and custodian of DSHS's abuse registry.[6] The declaration stated that DSHS listed Stroud on the abuse registry on April 20, 2007, for physical abuse and neglect—a finding made based on actions that occurred after Stroud's IP contract related to John had already terminated. DSHS attached to Sloan's declaration a December 22, 2006 initial order affirming APS's physical abuse and neglect findings in a separate case, and the Board's subsequent dismissal of Stroud's petition for review of that initial order as untimely.

Stroud made a motion in limine to exclude the new evidence contained in the Sloan declaration. Specifically, Stroud argued that because she challenged the 2004 final order upholding the 2003 APS neglect finding and subsequent contract termination, Sloan's declaration and attachments regarding events occurring in 2006 were improper as introducing new evidence not before DSHS in 2003. The superior court made an oral ruling to admit the Sloan declaration for purposes of DSHS's motion to dismiss only; the superior court struck the attached documents as potentially prejudicial to Stroud.[7]

On December 11, 2009, the superior court denied DSHS's motion to dismiss, noting that the court had previously issued rulings finding that Stroud had standing to contest APS's neglect finding which affected DSHS's decision to terminate her IP contract. The superior court then denied Stroud's petition for judicial review. Because the superior court upheld the Board's final

[6] DSHS maintains an abuse registry wherein it lists APS's findings of abuse, neglect, and exploitation.

[7] On February 2, 2010, the superior court issued a written order reiterating its earlier oral ruling partially granting Stroud's motion in limine.

order, it did not address any remedy issues, including whether Stroud was entitled to back pay or attorney fees. The superior court denied Stroud's motion for partial reconsideration on March 2, 2010.

Stroud appeals the December 30, 2004 final order.

DISCUSSION

In reviewing an administrative action, we sit in the same position as the superior court, applying the standards of the Administrative Procedures Act (APA), ch. 34.05 RCW, directly to the record before the agency. *Brighton v. Wash. State Dep't of Transp.*, 109 Wn. App. 855, 861-62, 38 P.3d 344 (2001) (citing ch. 34.05 RCW; *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993)). Under the APA, we may reverse an agency adjudicative decision if the agency's decision is unsupported by substantial evidence, based on erroneously interpreted or applied law, or is arbitrary and capricious. *Brighton*, 109 Wn. App. at 862 (citing *Tapper*, 122 Wn.2d at 402). The party challenging an agency's action bears the burden of demonstrating the invalidity of the decision. *Brighton*, 109 Wn. App. at 862 (citing RCW 34.05.570(1)(a)).

"The findings of fact relevant on appeal are the reviewing officer's findings of fact—even those that replace the ALJ's." *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 19, 256 P.3d 339 (2011) (citing *Tapper*, 122 Wn.2d at 406). In reviewing challenged findings for substantial evidence under RCW 34.05.570(3)(e),[8] substantial evidence is a sufficient quantity of

[8] RCW 34.05.570(3) states that a reviewing court shall grant relief from an agency order in an adjudicative proceeding only if it determines that

> (a) [t]he order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
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> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
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> (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

evidence to persuade a fair-minded person of the truth or correctness of the order. *Brighton*, 109 Wn. App. at 862 (citing *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)). As a reviewing court, we neither weigh the credibility of witnesses nor substitute our judgment for that of the agency. *Brighton*, 109 Wn. App. at 862 (citing *US W. Commc'ns, Inc. v. Util. & Transp. Comm'n*, 134 Wn.2d 48, 62, 949 P.2d 1321 (1997)). If substantial evidence supports the findings challenged, we review de novo conclusions of law to determine if the reviewing judge correctly applied the law. *Morgan v. Dep't of Soc. & Health Servs.*, 99 Wn. App. 148, 151, 992 P.2d 1023, *review denied*, 141 Wn.2d 1014 (2000). And we generally accord substantial deference to agency decisions. *Brighton*, 109 Wn. App. at 862 (citing *US W.*, 134 Wn.2d at 56).

December 30, 2004 Final Order

Our review of the sparse and piecemeal record presented to us for review suggests that the correct order for review is the May 23, 2006 final order affirming the ALJ's dismissal of

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> (d) The agency has erroneously interpreted or applied the law;
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> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
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> (f) The agency has not decided all issues requiring resolution by the agency;
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> (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
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> (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
>
> (i) The order is arbitrary or capricious.

Stroud's appeal as untimely. Although the record is confusing, both parties assert that the final order presented for our review in this case is that entered on December 30, 2004, which upheld the APS finding that Stroud neglected her father by leaving him alone without a wheelchair or Lifeline device. Here, because the parties agree, and in the interest of judicial economy, we grant the parties' request that we review the merits of the arguments based on the December 30, 2004 final order issued at the conclusion of John's case.

Stroud assigns error to the reviewing judge (1) assuming original jurisdiction, rather than appellate jurisdiction; (2) evaluating the evidence under the preponderance of the evidence standard, substituting its own view of the evidence for that of the ALJ; (3) reversing findings of fact that were supported by substantial evidence; (4) treating the ALJ's credibility findings as a presumption subject to rebuttal by preponderance of the evidence; and (5) applying the 2003 amendments to former RCW 74.34.020(9) (1999) retroactively. Because DSHS presented substantial evidence supporting the APS neglect finding to both the ALJ and the reviewing judge, we affirm.

A. Findings of Fact

Stroud argues that the reviewing judge erred by assuming "original jurisdiction" rather than "appellate jurisdiction" in reviewing the ALJ's May 13, 2003 initial decision. Br. of Appellant at 14. Specifically, Stroud argues that the December 30, 2004 final order on remand is in error because the reviewing judge added and amended essential findings of fact rather than deferring to the ALJ's credibility findings and because the reviewing judge found, as it did in the July 16, 2003 final order, that substantial evidence supported the ALJ's findings of fact. DSHS contends that the reviewing judge acted within authority provided by statute, agency rule, and by

the superior court's remand order. We agree with DSHS.

RCW 34.05.464(4) provides that a reviewing judge "shall exercise all the decision-making power that the reviewing [judge] would have had to decide and enter the final order had the reviewing [judge] presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law." And, "[i]n reviewing findings of fact by [ALJs], the reviewing [judge] shall give due regard to the [ALJ's] opportunity to observe the witnesses." RCW 34.05.464(4).

The reviewing judge is justified in substituting its factual findings for those of the ALJ only if the ALJ's findings of fact are unsupported by substantial evidence based on the entire record, the decision includes errors of law, or findings of fact must be added because the ALJ failed to make an essential factual finding. Former WAC 388-02-0600(2)(a), (c), (e); *Costanich v. Dep't of Soc. & Health Servs.*, 138 Wn. App. 547, 556, 156 P.3d 232 (2007), *rev'd on other grounds*, 164 Wn.2d 925, 194 P.3d 988 (2008). Substantial evidence must support the reviewing judge's additional findings and these findings must be consistent with the ALJ's findings supported by substantial evidence. Former WAC 388-02-0600(2)(e). Substantial evidence is that which is "'sufficient to persuade a reasonable person that the declared premise is true.'" *Costanich*, 138 Wn. App. at 556 (quoting *Alberton's, Inc. v. Emp't Sec. Dep't*, 102 Wn. App. 29, 36, 15 P.3d 153 (2000)). The reviewing agency or court must accept the fact finder's "'views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.'" *Costanich*, 138 Wn. App. at 556 (quoting *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-72, 859 P.2d 610 (1993)); *Hardee*, 172 Wn.2d at 19 n.11 (suggesting that when a "'reviewing officer ignores or reverses the credibility findings of the hearing officer, heightened scrutiny should apply

to substantial evidence review of any substituted findings of fact'" (quoting *Tapper*, 122 Wn.2d at 405 n.3)).

Here, the superior court remanded to the Board with instructions that it resolve whether Stroud's conduct amounted to neglect and whether the alternative reasons DSHS suggested justified terminating her contract.[9] On remand, the reviewing judge determined that the ALJ had failed to make essential findings necessary to resolve the two issues. The reviewing judge noted that substantial evidence supported the modifications to the findings of fact relating to John and they were consistent with the findings in the initial decision as required under former WAC 388-02-0600(2)(e).

The reviewing judge modified the findings of fact as follows: (1) because Schuman limited her evaluation to John's swallowing problems, her opinion that a caregiver be present when John ate was not a recommendation with respect to John's need for a caregiver at other times; (2) when Galvez entered the Stroud residence during a routine unannounced home visit, she heard a television and a "gurgling" sound; (3) Kendall opined that John could be left alone safely if he had a functional wheelchair and was able to use a Lifeline device; (4) John choked daily, frequently causing Stroud to use the Heimlich maneuver, and Stroud reported an increase in falls, at least one of which led to hospitalization; (5) the leading causes of death for Huntington's

[9] Specifically, the superior court remand order stated,

> Because the Board of Appeals ruled that the petitioner did not have a right to contest the APS finding of neglect, the Board did not consider whether Ms. Stroud's conduct met the definition of neglect under WAC 388-71-0540(4) and chapter 74.34 RCW. Nor did it consider any of the six alternative grounds under WAC 388-71-0546(4), 388-71-0551(1), (3), (4), (6), and (7), and chapter 74.39A RCW that were asserted below for terminating Ms. Stroud's contract.

AR at 689.

disease patients are aspiration pneumonia and choking; (6) there is no evidence in the record indicating John had a wheelchair or Lifeline device; (7) Lynn Weinacht, RN, reported that during a home visit on March 5, 2003, she saw John make several attempts to get through a door into a hallway and that he was not wearing his Lifeline device; (8) John was alone approximately 50 percent of the time when Crystal Scull, one of John's IPs, arrived at the Stroud residence; (9) 3 other caregivers reported to DSHS that Stroud asked that they leave John home alone; and (10) on January 13, 2003, Stroud told APS investigators that John could be left alone for 1 or 2 hours at a time.

The reviewing judge explained that the additional findings of fact were necessary to clarify that (1) Schuman did not mean to imply that John did not require 24-hour care; (2) John was not compliant with eating recommendations, increasing his choking risk; (3) Galvez observed facts essential to evaluate the possible risks John faced when left alone; (4) Kendall qualified her recommendation that John did not require 24-hour care based on John having access to a wheelchair and Lifeline device; (5) the primary risks John faced were choking and falling; and (6) Weinacht's personal observations formed the basis for her recommendation that John not be left alone.

Stroud did not include a transcript of Schuman, Scull, or Galvez's testimony in the record for our review as RAP 9.2(b) requires.[10] Accordingly, we could decline to address her challenges regarding those testimonies. RAP 10.3(a)(6). We note that Stroud's failure to provide us with a complete record limits our review to the clerk's papers, administrative records, and the reviewing

[10] RAP 9.2(b) provides that "[i]f the party seeking review intends to urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record all evidence relevant to the disputed verdict or finding."

judge's findings of fact and conclusion of law. *See Allemeier v. Univ. of Wash.*, 42 Wn. App. 465, 472-73, 712 P.2d 306 (1985), *review denied*, 105 Wn.2d 1014 (1986).

Here, an APS report in the record supports the finding that Galvez heard a television and a "gurgling" sound during a routine unannounced visit. A joint letter written by Kendall and Dr. Thomas D. Bird supports the finding that the leading causes of death for Huntington's disease patients are aspiration pneumonia and choking. Stroud did not present evidence to rebut the finding that John had no wheelchair and no access to a Lifeline device. Weinacht's consultation summary report supports the finding that she saw John without access to a wheelchair or a Lifeline device struggling with mobility issues. Galvez's report supports the finding that Stroud directed IPs to leave John alone and three IPs refused to continue John's care. And the record shows that Stroud admitted to Galvez on January 13, 2003, that she had left John alone and that she believed he could be alone for an hour or two at a time.

We hold that the reviewing judge was justified in making additional findings essential to resolve the APS neglect determination and contract termination issues and that substantial evidence in the record presented for our review supports each of the reviewing judge's modifications and additional findings. Former WAC 388-02-0600(2)(e); *Costanich*, 138 Wn. App. at 556; *Hardee*, 172 Wn.2d at 19 ("the review judge meticulously reviewed the evidence, as well as the ALJ's factual findings, and appropriately substituted her own findings when warranted"). Moreover, the additional findings are consistent with the ALJ's initial factual findings. Accordingly, we hold that Stroud's claim that the reviewing judge improperly assumed "original jurisdiction" fails.

B. Conclusions of Law

Stroud next assigns error to the reviewing judge's retroactive application of the 2003 amendment to former RCW 74.34.020(9) (1999). First, we analyze whether former RCW 74.34.020(9)(a) (1999) is ambiguous as the reviewing judge determined. In order to ascertain the meaning of former RCW 74.34.020(9) (1999), we look first to its language. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). If the language is not ambiguous, we give effect to its plain meaning. *Cerrillo*, 158 Wn.2d at 201. In ascertaining the "plain meaning" of a statute, we look not only to the ordinary meaning of the language at issue but also to the general context of the statute, related provisions, and the statutory scheme as a whole. *Belleau Woods II, LLC v. City of Bellingham*, 150 Wn. App. 228, 240, 208 P.3d 5, *review denied*, 167 Wn.2d 1014 (2009). But if a statute is ambiguous, we employ tools of statutory construction to ascertain its meaning. *Cerrillo*, 158 Wn.2d at 201. A statute is ambiguous if it is "'susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable.'" *Cerrillo*, 158 Wn.2d at 201 (internal quotation marks omitted) (quoting *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005)).

Former RCW 74.34.020(9)(a) (1999) provides that "neglect" is "a pattern of conduct or inaction by a person or entity with a duty of care to provide the goods and services that maintain physical or mental health of a vulnerable adult, or that avoids or prevents physical or mental harm or pain to a vulnerable adult." This broad language encompasses *any* pattern of conduct or inaction performed by a person with a duty of care to a vulnerable adult regardless of whether the pattern of conduct or inaction harmed the vulnerable adult. Indeed, former RCW 74.34.020(9)(a) (1999)'s definition of "neglect" includes every pattern of conduct or inaction performed by a person with a duty of care to a vulnerable adult even if the pattern of conduct or inaction has no

effect whatsoever on the vulnerable adult. The statute fails to limit which patterns of conduct or inaction amount to neglect of a vulnerable adult. *See generally City of Seattle v. Buchanan*, 90 Wn.2d 584, 605, 584 P.2d 918 (1978) (due process requires that the legislature describe prohibited conduct with sufficient clarity to give fair warning of what is forbidden (citing *State v. Galbreath*, 69 Wn.2d 664, 667-68, 419 P.2d 800 (1966))). Accordingly, we hold that the reviewing judge correctly determined the statute was ambiguous.

Second, we determine whether the reviewing judge properly applied the 2003 amendment. The presumption favoring prospective application of statutory amendments is overcome where an amendment is clearly curative, i.e., it technically corrects a statute or clarifies an ambiguity, and does not contravene judicial construction of a statute. *Harbor Steps Ltd. P'ship v. Seattle Technical Finishing, Inc.*, 93 Wn. App. 792, 799-800, 970 P.2d 797, *review denied*, 138 Wn.2d 1005 (1999). Here, the 2003 amendment clarified that the pattern of conduct or inaction must relate to a *failure* to provide "the goods and services that maintain physical or mental health of a vulnerable adult." Former RCW 74.34.020(9)(a) (2003). Thus, the amendment reasonably limited the patterns of conduct or inaction that could amount to neglect to those which *did not* maintain the physical or mental health of a vulnerable adult. The clarifying language did not substantively change the reviewing judge's analysis; it merely expressly stated the most reasonable reading of the ambiguous statute. Accordingly, Stroud's claim that the reviewing judge erred in retroactively applying the 2003 amendment to former RCW 74.34.020(9) (1999) fails.

Next, Stroud argues that the reviewing judge erred in applying a preponderance of the evidence standard rather than the substantial evidence standard required under former WAC 388-02-0600(2). The preponderance of the evidence standard requires that the evidence establish the

proposition at issue is more probably true than not true. *In re Dependency of H.W.*, 92 Wn. App. 420, 425, 961 P.2d 963, 969 P.2d 1082 (1998) (citing *In re Sego*, 82 Wn.2d 736, 739 n.2, 513 P.2d 831 (1973)). In contrast, substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the proposition at issue. *Brighton*, 109 Wn. App. at 862 (citing *City of Redmond*, 136 Wn.2d at 46).

Here, the record shows that the reviewing judge conducted a fact-specific detailed analysis satisfying the substantial evidence standard. In the December 30, 2004 final order, the reviewing judge conducted a lengthy factual analysis before determining that substantial evidence supported DSHS's 24-hour care requirement as necessary. The reviewing judge then conducted a thorough analysis to determine that substantial evidence supported a finding that Stroud left John alone or, in other words, that Stroud was knowingly noncompliant with DSHS's 24-hour care directive and her conduct amounted to neglect under former RCW 74.34.020(9) (1999). Thus, although Stroud is correct that the reviewing judge should have applied the substantial evidence standard on review, her argument fails because the record reveals that the reviewing judge, despite purporting to find that a preponderance of the evidence supported the neglect finding, actually reviewed the record for substantial evidence. Former WAC 388-02-0600(2)(b), (e); *see Hardee*, 172 Wn.2d at 19-20.

Last, Stroud asserts that the reviewing judge erred by failing to defer to the ALJ's credibility determination regarding Kendall's testimony. *Costanich*, 138 Wn. App. at 556. Specifically, Stroud argues that the reviewing judge improperly applied the preponderance of the evidence standard to escape the required deference given to the ALJ who had the opportunity to observe witnesses. We disagree.

First, as discussed above, the reviewing judge's analysis in the December 30, 2004 final order satisfies the substantial evidence standard of review. Second, Stroud's reliance on *Costanich* is misguided. In *Costanich*, the reviewing judge erroneously relied on hearsay evidence that the ALJ had rejected as wholly incredible. 138 Wn. App. 558-59. The reviewing judge then reweighed the evidence and substituted his own unsupported judgment for that of the ALJ. *Costanich*, 138 Wn. App. 558-59. Division One of this court held that the reviewing judge erred under former WAC 388-02-0600(2) because he "not only ignored the ALJ's credibility determinations, he also chose to base his decision on the very evidence the ALJ rejected as lacking credibility." *Costanich*, 138 Wn. App. 558-59.

By contrast, here, the reviewing judge did not rely on evidence that the ALJ expressly rejected as incredible. The ALJ had simply weighed the evidence differently in light of his erroneous legal assumptions. RCW 34.05.570(3)(d). In addition, here the reviewing judge did not supplant the ALJ's findings with inconsistent or unsupported additional essential findings. The reviewing judge properly found that the ALJ relied on erroneous legal assumptions. The reviewing judge then reviewed the evidence in light of the correct law. RCW 34.05.570(3)(d). Accordingly, we do not agree that the reviewing judge improperly applied a lower evidentiary persuasion burden to substitute his own judgment.

Moreover, the reviewing judge in this case explained five primary reasons it found Kendall's testimony unpersuasive. First, Kendall's testimony lacked a precise standard or measurement to explain the brief periods of time she felt John could be alone. Second, the facts in this case revealed unmet qualifications to Kendall's opinion, i.e., that John have use of a wheelchair and a Lifeline device. Third, Kendall's recommendation was inconsistent with the plan

and recommendations by all the other medical professionals. Fourth, Kendall's testimony was illogical because it suggested that 24-hour care was unnecessary because John's choking and falling risks would be present regardless of whether a caretaker was present; but the purpose of a caretaker would be to mitigate those risks. Fifth, Kendall did not challenge DSHS's assertion that John was at risk without a 24-hour caregiver. We hold that the reviewing judge's stated reasons, viewed in light of the entire record and under the correct law, are reasonable and supported by substantial evidence. *Costanich*, 138 Wn. App. at 556.

Because the reviewing judge correctly determined that the ALJ's initial decision rested on two errors of law and that the ALJ necessarily weighed the evidence in light of those two errors, we hold that the reviewing judge was justified in discounting Kendall's vague and qualified testimony in light of the other competing fact-specific evidence. *Hardee*, 172 Wn.2d at 19 n.11. The reviewing judge did not err in finding that substantial evidence supported DSHS's conclusion that John required 24-hour care and that Stroud failed to provide such care. The reviewing judge engaged in a thorough, fact-specific review of the initial order and modified the factual findings to include essential findings supported by substantial evidence necessary to resolve the APS neglect finding and contract termination issues as the superior court directed. The findings of fact as modified are consistent with the ALJ's initial findings and we affirm.

Judicial Review

A. Additional Evidence on Review

Stroud next avers that the superior court erred in admitting the Sloan declaration as potentially prejudicial. Generally, a superior court conducts judicial review of disputed issues of fact without a jury and is confined to the agency record as defined by the APA. RCW 34.05.476,

.558. A reviewing court may receive evidence in addition to that contained in the agency record only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding (1) improper constitution as a decision-making body or grounds for disqualification of those taking the agency action; (2) unlawfulness of procedure or of decision-making process; or (3) material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record. RCW 34.05.562.

Here, the superior court admitted the Sloan declaration only for purposes of DSHS's motion to dismiss. Specifically, the record shows that the superior court admitted the declaration to better understand Stroud's argument that DSHS had wrongfully placed her name on its abuse registry in connection with the present case but that she conceded her name was properly listed on the registry in connection to a different abuse and neglect finding that occurred in 2006. The superior court subsequently denied DSHS's motion to dismiss. The superior court did not consider Sloan's declaration in reviewing Stroud's petition for judicial review of the 2003 neglect finding. We hold that, even if the declaration was potentially prejudicial in the review of the 2003 neglect finding, it was not admitted in that action. Moreover, because the reviewing court did not consider it in reviewing Stroud's petition, she suffered no harm. RAP 3.1.

B. Back Pay

Stroud further asserts that because the APS neglect finding was erroneous and DSHS wrongfully terminated her IP contract, she is entitled to "back pay" for the care she provided John from July 16, 2003, when DSHS ceased payments following the Board's first final order, until his death on October 18, 2004. The superior court did not reach this issue and Stroud has not included a copy of her IP contract in the record for our review. RAP 9.2(b). Assuming without

deciding that Stroud would be entitled to "back pay" if she prevailed, because we hold that substantial evidence supports the APS neglect finding, she has not prevailed. Stroud is not entitled to "back pay" for this time period.

C. Attorney Fees for Previous Reversal of DSHS Final Order

Stroud also contends that she is entitled to attorney fees pursuant to RCW 74.08.080(3) and RCW 4.84.350[11] for what she characterizes as her successful reversal of the May 23, 2006 final order. As an initial matter, we note that RCW 74.08.080(3) concerns public assistance recipients and does not apply to Stroud, a contractor hired to work in the service of a recipient of public assistance. Next, RCW 4.84.350(1) requires that Stroud, an uncontested qualified party, "obtain[] relief on a significant issue that achieves some benefit."

On February 27, 2006, the ALJ dismissed Stroud's appeal as untimely. On May 23, the Board affirmed on the same ground. On June 20, Stroud petitioned for judicial review of the December 30, 2004 final order. The superior court denied the petition on December 11, 2009.

Nothing in the record supports Stroud's assertion that she successfully "reversed" the May 23, 2006 final order. Rather, it appears that although the Board dismissed as untimely Stroud's appeal on May 23, 2006, the superior court conducted a limited review of the December 30, 2004 final order in 2009. We ordered supplemental briefing from the parties in an attempt to clarify the confusing procedural history of this case to determine whether the superior court had, and whether this court has, jurisdiction to review a final order entered in John's appeal in *Stroud's* appeal. The events between 2006 and 2009 during which the parties apparently agreed Stroud could continue a limited appeal of a final order issued in her father's case remain unclear to us

[11] RCW 4.84.350(1) provides,

> [A] court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

even after reviewing the parties' supplemental briefs. Nevertheless, as discussed above, because the parties have agreed that the December 30, 2004 final order is the order presented for our review, at their request we have reviewed the merits of the parties' arguments with respect to that order. As to the May 23, 2006 final order that Stroud asserts she successfully "reversed," however, Stroud has failed to include in the record before us evidence of an order or ruling expressly reversing the May 23, 2006 dismissal of her appeal. Stroud is not entitled to an award of attorney fees in connection with the May 2006 order.

Attorney Fees and Costs

Last, Stroud argues that she is entitled to attorney fees and costs on appeal pursuant to RCW 74.08.080(3) and RCW 4.84.350. As discussed above, RCW 74.08.080(3) does not apply. Moreover, because we affirm the December 30, 2004 final order, Stroud is not a prevailing party entitled to attorney fees and we also deny her request for attorney fees on appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, P.J.

JOHANSON, J.