COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP1561 **Cir. Ct. No. 2016CV8271**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT 1

SALEEM EL-AMIN,

PETITIONER-APPELLANT,

V.

DEPARTMENT OF CHILDREN AND FAMILIES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Kessler, P.J., Brennan and Dugan, JJ.

¶1 KESSLER, J. Saleem El-Amin appeals an order of the circuit court affirming a decision of the Department of Children and Families (DCF) that found El-Amin committed neglect of a child within the meaning of WIS. STAT.

§ 48.02(12g) (2015-16).[1] El-Amin contends that: (1) he is not a caregiver, as contemplated by WIS. STAT. § 48.685; (2) the Administrative Law Judge (ALJ) violated his due process rights; (3) the ALJ relied on facts contrary to the evidence; and (4) the proceedings before the ALJ were fundamentally unfair. We disagree and affirm.

BACKGROUND

¶2 This case arises out of allegations that El-Amin, as the CEO of New Horizons Center, Inc., a company that operates an assessment and stabilization center for abused and neglected boys called A Positive Outlook (APO), committed child neglect. According to facts stipulated before the ALJ, in November 2015, two boys, D.S. and D.L., were placed at APO. D.S. was fifteen years old at the time. D.L. was twelve years old. D.L. alleged that D.S. sexually assaulted him on November 4, 2015, after the two boys were placed in the same room.

¶3 APO had a contract with the Division of Milwaukee Child Protective Services (DMCPS) to receive emergency child placements. The contract prohibited APO from turning boys away on the basis of insufficient information, but also required the DMCPS to provide background information about the boys seeking placement. The DMCPS provided the relevant information in orange folders.

¶4 In 2014, D.S. was placed at APO, but was subsequently placed on a list prohibiting him from returning after staff discovered that D.S. engaged in sexual behavior with another resident. El-Amin was notified about D.S.'s behavior and D.S. was removed from APO.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶5 On November 4, 2015, D.S. was again placed at APO after El-Amin received two phone calls regarding the placement of D.S. and D.L. El-Amin agreed to allow the boys to come to APO for intake, though El-Amin himself was not involved in the intake process. The boys arrived separately, without orange folders, and were placed in the same room after D.L. expressed concern about being in a room by himself. None of APO's intake staff was told to keep the boys separate or reminded to consult the prohibited return list.

¶6 On November 6, 2015, D.L. told an APO employee, Jesse McWilliams, that "something might have happened" between D.S. and himself earlier in the week. McWilliams called El-Amin and told him that "something might have happened" between the boys. El-Amin did not inquire about what happened but told McWilliams to follow APO's protocol, which required taking statements from the boys and reporting the incident to APO's program director, Danielle Dumas-Akobundu. El-Amin did not follow up with McWilliams as to the nature of the incident or whether there was a need for the involvement of Child Protective Services. On November 9, 2015, Dumas-Akobundu called 220-SAFE and reported D.L.'s allegations. On that day, Dumas-Akobundu also told El-Amin for the first time that the incident between the boys might have been sexual.

¶7 The matter was referred to the DMCPS, and ultimately to Community Impact Programs (CIP), for an independent investigation. CIP issued an Initial Determination of Child Maltreatment against El-Amin and two APO employees. CIP then issued a Notice of Final Determination of Substantiated Child Maltreatment by neglect against El-Amin and the two employees. The determination was based on a finding that El-Amin was aware of the risks associated with placing the boys in the same room because El-Amin was familiar

with D.S.'s history and that El-Amin failed to provide pertinent information to his staff.

¶8 El-Amin appealed the determination to the Division of Hearings and Appeals (DHA). Following a hearing, the ALJ found that, in accordance with the definition of "neglect" provided by WIS. STAT. § 48.02(12g),[2] CIP properly issued its determination. Specifically, the ALJ found that El-Amin committed neglect in five ways: (1) by not having a system in place to make sure that boys who might endanger the safety of others are denied admission; (2) by failing to place D.S. and D.L. in separate rooms; (3) by not inquiring further when McWilliams contacted him and told him that "something might have happened" between the boys; (4) by not ensuring that APO employees did their jobs; and (5) by not having a system in place to deal with placement referrals that often arrive with insufficient background information.

¶9 El-Amin appealed the ALJ's determination to the circuit court pursuant to WIS. STAT. ch. 227. El-Amin argued that the ALJ ignored CIP's allegations and instead made findings which relied on "uncorroborated hearsay, considered evidence outside the record of the hearing, ignored evidence that was presented, and followed her will, not her judgment." El-Amin also argued that his due process rights were violated because "absent witnesses denied [his] right to confront the evidence," and that the proceedings were fundamentally unfair. (Bolding, some capitalization, and italics omitted.)

¶10 In a thorough, well-reasoned decision, the circuit court upheld the ALJ's determination. This appeal follows.

[2] WISCONSIN STAT. § 48.02(12g) states: "'Neglect' means failure, refusal or inability on the part of a caregiver, for reasons other than poverty, to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child."

DISCUSSION

¶11 On appeal, El-Amin raises numerous arguments. He contends that: (1) he is not a "caregiver" under WIS. STAT. § 48.02(12g); (2) he was denied due process because he did not have the opportunity to confront the evidence against him; (3) he was denied due process because the ALJ relied on uncorroborated hearsay; (4) he was denied due process because he had no notice of the theory under which he would be held liable; (5) the ALJ relied on findings of fact contrary to the evidence; and (6) the proceedings were fundamentally unfair.

¶12 In an appeal under WIS. STAT. ch. 227, we review the agency's decision, not the decision of the circuit court. *See* ***Chicago & N. W. Transp. Co. v. Office of the Comm'r of R.R.s***, 204 Wis. 2d 1, 7, 553 N.W.2d 845 (Ct. App. 1996). "When we review an administrative agency's interpretation or application of a statute, we apply one of the following: great weight deference, due weight deference, or no deference." *See* ***DaimlerChrysler Servs. N. Am. LLC v. DOR***, 2006 WI App 265, ¶6, 298 Wis. 2d 119, 726 N.W.2d 312. No deference is appropriate when any of the following is true: "(1) the issue before the agency is clearly one of first impression; (2) a legal question is presented and there is no evidence of any special agency expertise or experience, or (3) the agency's position on an issue has been so inconsistent that it provides no real guidance." ***Id.***, ¶9. Here, the parties agree that the ALJ's decision is subject to *de novo* review. We agree and conduct our review accordingly.[3]

[3] The circuit court applied due weight deference. DCF points out that the Wisconsin Supreme Court "recently heard argument in a case that will consider whether judicial deference to agency interpretations of statutes comports with the Wisconsin Constitution." *See* ***Tetra Tech EC, Inc. v. DOR***, 2017 WI App 4, 373 Wis. 2d 287, 890 N.W.2d 598, *review granted*, 2017 WI 47, 375 Wis. 2d 129, 898 N.W.2d 583. Accordingly, we conduct our review *de novo*, but note that "'in most situations, applying due weight deference will lead to the same result as would

I. El-Amin forfeited the argument that he is not a caregiver.

¶13 DCF notes that El-Amin failed to raise this argument before the ALJ or the circuit court. "[T]his court will not consider issues beyond those which were properly before the court below." *See* ***Goranson v. DILHR***, 94 Wis. 2d 537, 545, 289 N.W.2d 270 (1980). Accordingly, we deem this argument forfeited.

II. El-Amin was not denied due process.

¶14 El-Amin contends that his due process rights were violated in multiple ways.

¶15 First, El-Amin contends that he was denied the opportunity to confront the evidence against him. During the hearing before the ALJ, CIP presented evidence about what various witnesses would have said had they testified, but the witnesses themselves were not available. Specifically, El-Amin names Melanie Estill, Angela Crosley, Keena Crawford, McWilliams, and Dumas-Akobundu. El-Amin argues that there was inconsistent testimony at the hearing regarding who actually called him on November 4, 2015—Estill or Crawford. He also contends that Crosley, the CIP agent who wrote the initial assessment, wrote an inaccurate report. He also contends that testimony from McWilliams could have been helpful to his case and that the ALJ improperly relied on testimony from Dumas-Akobundu's own neglect hearing.[4] El-Amin contends that because these witnesses did not testify, he did not have an opportunity to confront the evidence against him. We disagree.

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applying no deference at all.'" *See* ***Jamerson v. DCF***, 2013 WI 7, ¶46, 345 Wis. 2d 205, 824 N.W.2d 822 (citation omitted).

[4] Dumas-Akobundu was also found to have committed neglect of a child within the meaning of WIS. STAT. § 48.02(12g) in a separate proceeding before an ALJ.

¶16 While El-Amin spends much time discussing missing witnesses, he ignores the evidence that the ALJ actually relied on. The ALJ's decision relied primarily on the facts stipulated by the parties and on El-Amin's own testimony; particularly, the undisputed facts that El-Amin knew of D.S.'s history of sexual behavior, El-Amin did not take steps to ensure that D.S. and D.L. were placed in separate rooms, and El-Amin did not inform his staff about D.S.'s history. The ALJ's decision did not focus on who called El-Amin on November 4, 2015, or any inaccuracies in the CIP report. To the extent the ALJ referenced McWilliams or Dumas-Akobundu, it did so in the context of the stipulated facts. Moreover, El-Amin could have called McWilliams to testify on his behalf, but did not do so. In short, El-Amin's due process rights were not violated by an inability to confront the evidence against him.

¶17 Second, El-Amin contends that the ALJ relied on uncorroborated hearsay in violation of ***Gehin v. Wisconsin Group Insurance Board***, 2005 WI 16, 278 Wis. 2d 111, 692 N.W.2d 572. In that case, the Wisconsin Supreme Court held that uncorroborated hearsay medical reports did not constitute substantial evidence to support the agency's factual findings. ***Id.***, ¶82. El-Amin misapplies ***Gehin*** to the facts of his case.

¶18 In ***Gehin***, the Wisconsin Group Insurance Board relied *solely* on the written hearsay reports of three doctors, none of whom testified at the hearing. ***Id.***, ¶¶30-32. Witnesses who testified contradicted the contents of the report. ***Id.***, ¶32. The supreme court concluded that the agency erred by relying on "uncorroborated written hearsay medical reports *alone* that were controverted by in-person testimony." ***Id.***, ¶110 (emphasis added).

¶19 Here, the ALJ did not rely on uncorroborated hearsay alone; rather, the ALJ relied primarily on El-Amin's own testimony and on the stipulated facts. El-Amin testified that he knew about D.S.'s prior incident at APO and the parties stipulated that a prior incident occurred. El-Amin's testimony established that he did not recall D.S. when El-Amin was initially called about the child's placement, that there was no system in place for APO staff to determine D.S.'s history at the facility when D.S. arrived, and that El-Amin did not follow-up with staff after learning from McWilliams on November 6, 2015, that "something might have happened" between D.S. and D.L. Simply put, the ALJ did not solely rely on uncorroborated hearsay.

¶20 Third, El-Amin contends that the ALJ "invent[ed] her own theory of neglect," thus violating his due process rights because he did not have an opportunity to defend himself. The ALJ found that El-Amin committed child neglect in five ways: (1) by not having a system in place to make sure that boys who might endanger the safety of others are denied admission; (2) by failing to place D.S. and D.L. in separate rooms; (3) by not inquiring further when McWilliams contacted him and told him that "something might have happened" between the boys; (4) by not ensuring that APO employees did their jobs; and (5) by not having a system in place to deal with placement referrals that often arrive with insufficient background information. El-Amin argues that the ALJ erroneously reached these determinations by focusing primarily on the boys' placement in the same room given what El-Amin knew about D.S. prior to his November 4, 2015 admission to APO.

¶21 El-Amin's suggestion that he was blindsided by the ALJ's determinations belies the record. Counsel for CIP laid out the theories of liability at the beginning of the hearing:

> [T]hey were in the same group home. Well, first that they were in the same group bedroom, and then after the allegation came out on the sixth, that … A Positive Outlook, the employee there failed to report it to Milwaukee Police Department or to … Child Protective Services … until the 9th. And that these boys continued to reside in the same home, in the same common area. The younger boy['s] … behaviors were escalating because of it and no medical attention was … sought for either boy. So it's … not just the fact that the sexual assault occurred, it's their failure to protect after they learned of the allegation.

¶22 The ALJ's determinations directly address the theories of liability put forth by CIP. We agree with DCF that El-Amin's argument is really that the ALJ's determinations are not supported by evidence in the record. We address that issue below.

III. Substantial evidence supports the ALJ's determinations.

¶23 The findings of fact made by the ALJ are reviewed using the "substantial evidence" standard, under which the findings must be upheld "if they are supported by 'credible and substantial evidence.'" *See* ***Brown v. DCF***, 2012 WI App 61, ¶11, 341 Wis. 2d 449, 819 N.W.2d 827 (citation omitted; one set of quotation marks omitted). We set aside an agency's findings "'only when a reasonable trier of fact could not have reached them from all the evidence before it, including the available inferences from that evidence.'" *See* ***id.*** (citation omitted).

¶24 El-Amin contends that the ALJ made multiple findings contrary to the evidence in the record. Specifically, that: (1) El-Amin did not have a system in place to make sure that he did not inadvertently admit a boy who would endanger other residents; (2) El-Amin was responsible for the initial decision to place D.S. at APO; and (3) a sexual assault actually occurred. The record supports all of the ALJ's factual findings.

¶25 El-Amin's testimony established that he was generally the first person to receive a phone call when a child needed an emergency placement at APO. El-Amin testified that when he received the phone call about D.S., he did not recognize the child's name as someone who had previously been at APO. El-Amin stated that after he received the phone call regarding D.S. and the subsequent phone call regarding D.L., he called the residential director at APO to let her know that the boys would be arriving. El-Amin stated that he does not take part in the intake process and that the "orange folders" containing background information about the children are received at intake, but the folders were not provided for the boys on November 4, 2015. El-Amin admitted, however, that he serves as a "gatekeeper to see if the youth is eligible for intake." He also stated that files for current residents are kept at APO. Counsel for CIP told El-Amin that a current resident file for D.S. describing D.S.'s previous behavior was located at APO and asked El-Amin whether APO staff could have found that file prior to admitting D.S. El-Amin responded "Maybe. Maybe not." Indeed, El-Amin told counsel that many of her questions would be better answered by other APO staff members. The ALJ's findings that El-Amin did not have an organized safety system in place and that El-Amin made the initial decision to allow D.S. to stay at APO are consistent with El-Amin's own testimony.

¶26 As to El-Amin's contention that there was insufficient evidence for the ALJ to determine that a sexual assault actually occurred, El-Amin ignores the stipulated facts which contain D.L's detailed statements to police about the assault. D.S. was also adjudicated guilty of a sexual assault. The ALJ's determination is supported by the record.

IV. The administrative proceedings were not fundamentally unfair.

¶27 Finally, El-Amin contends that the administrative proceedings were fundamentally unfair because APO was contractually bound to accept D.S.'s placement per its agreement with the DMCPS and because CIP's investigation report was inaccurate.

¶28 Whether El-Amin was contractually bound to place D.S. at APO on November 4, 2015, is irrelevant to the facts of this case. D.S.'s mere placement at APO was not the basis of the ALJ's determination. Rather, the ALJ's determination focused primarily on El-Amin's lack of safety measures, lack of organization, and lack of follow-up after learning of a possible incident between the boys.

¶29 As to the CIP investigation report, El-Amin pointed out multiple inaccuracies during his testimony. Moreover, the actual investigation report is also irrelevant. The ALJ's determinations were based on testimony taken at the hearing and the stipulated facts, not the CIP report. Accordingly, the administrative proceedings were not fundamentally unfair.

¶30 For the foregoing reasons, we affirm the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.