

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re:) Docket No. 05-2011-L-1920
)
 [APPELLANT'S NAME]) REVIEW DECISION AND FINAL ORDER
)
 Appellant) Resident Protection Program (CNA)

I. PROCEDURAL HISTORY

1. The Department of Social and Health Services (Department) received an allegation that the Appellant had financially exploited a vulnerable adult. After investigation and review, the Department determined that the allegation of financial exploitation was substantiated. The Appellant requested a hearing to contest the Department's substantiated finding of financial exploitation. Administrative Law Judge (ALJ) Carolyn Pinkett held an administrative hearing on August 24, 2011, and issued an *Initial Order* on October 26, 2011, wherein she reversed the Department's substantiated finding of financial exploitation.

2. The Department filed a *Petition for Review of the Initial Order* on November 16, 2011.

3. On November 23, 2011, the Appellant requested additional time in which to file a *Response* to the *Petition for Review of the Initial Order*. The Appellant was granted an extension in the timely response filing deadline until December 7, 2011.

4. On December 7, 2011, the Appellant filed a *Response* to the Department's *Petition for Review of the Initial Order*.

II. FINDINGS OF FACT

The undersigned has reviewed the record of the hearing, the documents admitted as exhibits, the *Initial Order*, the *Petition for Review of the Initial Decision*, and the *Response*. The following necessary findings of fact were relevant and supported by substantial evidence in the record.

1. On May 3, 2011, DSHS served the Appellant with a *Notice of Preliminary Finding* which states, in part, that DSHS “has found that you financially exploited a vulnerable adult.” On May 16, 2011, the Appellant filed a request for hearing to contest the financial exploitation finding. Her request for hearing states as follows: “*I took one drop of morphine. It never happened before or after and the patient didn’t suffer, wasn’t taking the morphine.*”

2. The *Notice of Preliminary Finding* stated that the financial exploitation finding was based upon the following facts:

The Incident

You were the owner of [BUSINESS NAME 1]. You financially exploited a vulnerable adult who was a resident in your home on October 9, 2010 when you took the resident’s morphine medication for your own use.

3. In October 2010, the Appellant was the co-owner of the [BUSINESS NAME 1] ([BUSINESS NAME 1]). [NAME 1] was a resident of the home.¹ She was 91 years old, she suffered from dementia, and she was on hospice care. [NAME 1] began hospice care on August 26, 2010. On September 26, 2010, her *Negotiated Care Plan* was amended, to note that her hospice nurse would now dispense her medications to her. These medications included “comfort medications,” that were prescribed for end-of-life treatment. They were intended to address anxiety, agitation, shortness of breath, and pain. Included in the medication was a vial of liquid morphine. The prescribed dosage of morphine, if needed, was 1/4 to 1/2 cubic centimeter (cc). [NAME 1] did not need any of the comfort medications that were prescribed for her, because her symptoms were well-managed without them.

4. The Appellant suffers from depression. In August of 2002, she was admitted to the psychiatric unit at [BUSINESS NAME 2] after she tried to commit suicide by taking 23 Motrin tablets. She was hospitalized for one and a half days, and was discharged on her request. In October 2009, the Appellant was in the middle of divorce proceedings. She also had financial

¹The full name of the residents will not be used to protect their right to confidentiality.

problems. And, she was very stressed because her [SPOUSE] had threatened to take their two young [RELATIVES] from her when the divorce became final. On October 2, 2009, she was admitted to the psychiatric unit of [BUSINESS NAME 2], after she reportedly tried to commit suicide by taking an overdose of Oxycodone. The Appellant's treating physician encouraged her to delay her hospital discharge, and "strongly encouraged her to consider the partial-day hospitalization program." The Appellant declined, citing money concerns, and asked to be discharged on October 6, 2009.

5. The Appellant was discharged on October 6, 2009, with the following diagnoses:

Axis I: Major depressive disorder, recurrent, severe, without psychotic features.

Axis II: Deferred.

Axis III: Status - post cholecystectomy in May 2009, recent onset of abdominal cramping and pain in the upper quadrants, possible fatty infiltration.

Axis IV: Moderate stressors.

Axis V: Global assessment of functioning (GAF) is 50.

The Appellant was discharged with the following prescriptions: Wellbutrin, Omeprazole, and Sertraline. Wellbutrin is an anti-depressant. Omeprazole is prescribed to treat gastroesophageal reflux disease (GERD). Sertraline or Zoloft, is prescribed to treat depression.

6. On October 12, 2010, the Residential Care Services (RCS), Complaint Resolution Unit (CRU), received an anonymous complaint which alleged that the Appellant took some of her resident's medications in a "failed suicide attempt." Katherine Ander is a complaint investigator. On October 12, 2010, Ms. Ander was assigned to investigate the licensing complaint. On October 13, 2010, at 8:00 a.m., Ms. Ander went to the [BUSINESS NAME 1] to investigate. When Ms. Ander arrived, there were six residents in care. All of the residents appeared to be well cared for. There was only one resident, [NAME 1], who was prescribed a narcotic drug, morphine, to address end-of-life issues. Ms. Ander looked at the vial of morphine. There was dark brown liquid in the vial. Fifteen (15) ccs had been dispensed by the

pharmacy. The seal on the vial was broken, and it appeared as if approximately one cc of morphine was missing. Katherine Ander interviewed [NAME 1]'s hospice nurse on October 13, 2010, and she learned that [NAME 1] did not need any of the comfort medications that had been prescribed for her.

7. On October 12, 2010, the Appellant was emotionally distressed about her divorce and she was in physical pain. She wanted her pain to stop. Her [RELATIVE 1], who is also a licensed adult family home owner, called her and asked her to go to the pharmacy to pick up some comfort medications for a resident in his home who was on hospice care. The Appellant took [NAME 1]'s morphine, and went to a local [PUBLIC TRANSPORTATION] station. She took one-half capful of the morphine, which made her feel sleepy. She called her ex-[SPOUSE], and asked if she could come to his home to sleep. He told her "no". Her [RELATIVE 1] soon arrived at the [PUBLIC TRANSPORTATION] station and took her back to his home. The Appellant was still in physical pain when she arrived at her [RELATIVE 1]'s home. Her [RELATIVE 2] then took her to [BUSINESS NAME 2]. She was initially admitted to the hospital based upon her physical pain. After she advised the treating staff that she had taken the morphine in a "failed suicide attempt", she was admitted to the psychiatric unit. Ms. Ander interviewed the Appellant on October 18, 2010, after she had been discharged from [BUSINESS NAME 2].

8. Based upon the testimony of Ms. Ander, it is determined that one-half capful of morphine would have eased the Appellant's physical pain and made her feel sleepy. It would not have killed her. It is further determined that the Appellant's physical pain is closely correlated to her psychological pain. For example, her signs of physical distress are exacerbated when she is emotionally distressed. "Drug diversion" is a term of art used in the nursing profession to describe when a health care professional is unlawfully taking a patient's prescription medication for his or her own use, or, to sell to others. In this case, the Appellant took [NAME 1]'s morphine and eased her own physical and emotional distress.

9. Mary Moran is the Complaint Investigator who was assigned to investigate the Resident and Client Protection Program complaint. Ms. Moran interviewed the Appellant, her [RELATIVE 1], and two caregivers who lived in the home. She also interviewed the [BUSINESS NAME 3] hospice nurse who was assigned to [NAME 1]. Finally, she reviewed [NAME 1]'s medical records, and various medical records related to the Appellant. Ms. Moran concluded that [NAME 1] had been a victim of financial exploitation, when the Appellant ingested some of [NAME 1]'s morphine, because [NAME 1] did not benefit or profit from the Appellant's actions.

III. CONCLUSIONS OF LAW

1. The *Petition for Review* was timely filed and is otherwise proper.² Jurisdiction existed to review the *Initial Order* and to enter the final agency order.³

2. Pursuant to WAC 388-02-0220, ALJs and Review Judges must first apply the Department of Social and Health Services (DSHS) rules adopted in the Washington Administrative Code (WAC). If no DSHS rule applies, the ALJ or Review Judge must decide the issue according to the best legal authority and reasoning available, including federal and Washington State constitutions, statutes, regulations, and court decisions.

3. In an adjudicative proceeding involving a finding of financial exploitation of a vulnerable adult, the undersigned Review Judge has the same decision-making authority as the ALJ to decide and enter the *Final Order*, in the same way as if the undersigned had presided over the hearing.⁴ This includes the authority to make credibility determinations and to weigh the evidence. Because the ALJ is directed to decide the issues *de novo* (as new), the undersigned has also decided the issues *de novo*. In reviewing the Findings of Fact, the undersigned has given due regard to the ALJ's opportunity to observe the witnesses, but has otherwise independently decided the case.⁵ The undersigned reviewing officer does not have

² WAC 388-02-0560 through -0585.

³ WAC 388-02-0215, -0530(2), and -0570.

⁴ WAC 388-02-0217(3).

⁵ WAC 388-02-0600, effective March 3, 2011.

the same relationship to the presiding officer as an Appellate Court Judge has to a Trial Court Judge; and the case law addressing that judicial relationship does not apply in the administrative hearings forum.

4. The Washington Administrative Procedure Act directs Review Judges to personally consider the entire hearing record.⁶ Consequently, the undersigned has considered the adequacy, appropriateness, and legal correctness of all initial Findings of Facts and Conclusions of Law, regardless of whether any party has asked that they be reviewed.

5. It may help to explain briefly at the outset the unique characteristics and specific limitations of the administrative hearing process. An administrative hearing is held under the auspices of the *executive branch of government* and neither the ALJ nor the Review Judge enjoy the broad equitable authority of a Superior Court Judge within the *judicial branch of government*. It is well settled that administrative agencies, such as the OAH and the Board of Appeals, are creatures of statute, without inherent or common law powers, and, consequently, they may exercise only those powers expressly granted in enabling statutes or necessarily implied therein.⁷

6. Department regulations address what standard of proof is to be used in these types of hearings, providing that, "The ALJ shall decide if a preponderance of the evidence in the hearing record supports a determination that the alleged perpetrator committed an act of abandonment, abuse, financial exploitation, or neglect of a vulnerable adult."⁸ The "preponderance of the evidence" standard is required under the regulations relevant to this proceeding. This standard means that it is more likely than not that something happened or exists.⁹

⁶ RCW 34.05.464(5).

⁷ *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998), and *Taylor v. Morris*, 88 Wn.2d 586, 588 (1977). See also WAC 388-02-0216 which provides, "The authority of the ALJ and the review judge is limited to those powers conferred (granted) by statute or rule. The ALJ and the review judge do not have any inherent or common law powers."

⁸ WAC 388-71-01255(1).

⁹ WAC 388-02-0485.

7. Chapter 74.34 of the Revised Code of Washington (RCW) is titled “Abuse of Vulnerable Adults.” The Department has implemented chapter 74.34 RCW by adopting WAC chapter 388-71-0100 through - 01280, entitled “Home and Community Services and Programs-Adult Protective Services.” Administrative hearings conducted under these regulations are controlled by statutes and regulations found at RCW 34.05 and WAC 388-02, respectively.¹⁰ Chapter 74.34 RCW establishes a system for reporting instances of financial exploitation of a vulnerable adult. “*Financial exploitation*” is specifically defined as the illegal or improper use of a vulnerable adult’s property by any person, for any profit or advantage other than for the vulnerable adult’s profit or advantage. Financial exploitation includes the use of a vulnerable adult’s property without lawful authority, by a person or entity who knows that the vulnerable adult lacks the capacity to consent to the release or use of her property.¹¹ Although a *duty of care* is required to exist in finding abandonment or neglect of a vulnerable adult, it is not required in showing financial exploitation of a vulnerable adult. **Any person** can financially exploit a vulnerable adult, just as any person can sexually abuse a vulnerable adult.¹²

8. The statute defines “vulnerable adult” to include a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; a person found incapacitated under RCW 11.88; a person with a developmental disability as defined under RCW 71A.10.020; a person admitted to any facility; a person receiving services from a home care agency licensed under RCW 70.127; or a person receiving services from an individual provider.¹³ [NAME 1] was the alleged victim in this matter. She was a resident of [BUSINESS NAME 1], she was 91 years old, she suffered from dementia, and she was on

¹⁰ WAC 388-71-01245.

¹¹ RCW 74.34.020(6).

¹² See RCW 74.34.020(2) as opposed to (1) and (9).

¹³ RCW 74.34.020(13).

hospice care. Therefore, it is concluded that she was a vulnerable adult during the time period at issue, as defined by the statute, and was entitled to the protections provided therein.

9. As stated above, RCW 74.34.020(6), defines "*Financial exploitation*" as the illegal or improper use of a vulnerable adult's property by any person, for any profit or advantage other than for the vulnerable adult's profit or advantage. Financial exploitation includes the use of a vulnerable adult's property without lawful authority, by a person or entity who knows that the vulnerable adult lacks the capacity to consent to the release or use of her property.¹⁴ In this matter, the Department has proven by a preponderance of the hearing evidence that the Appellant financially exploited a vulnerable adult when she illegally used [NAME 1]'s morphine for her own advantage in a way that did not profit [NAME 1]. Furthermore, this Appellant's actions clearly mirror the example listed in RCW 74.34.020(6)(c), wherein the Appellant used [NAME 1]'s prescription morphine without lawful authority, knowing that [NAME 1] lacked the capacity to consent to the use of the morphine.

10. The undersigned is not persuaded by the Appellant's argument that she did not financially exploit a vulnerable adult, because the illegal use of [NAME 1]'s morphine conferred no profit or advantage to the Appellant. As defined in initial Conclusion of Law 9, "*advantage*" is a "*benefit, gain, especially benefit resulting from some course of action.*" Under this definition, the ALJ clearly erred in initial Conclusions of Law 10, wherein she stated that: "*The Appellant ingested [NAME 1]'s morphine because she was depressed, and she wanted to commit suicide. This end result would not have been beneficial, or profitable, for the Appellant. Thus, the financial exploitation finding should not be upheld.*" The ALJ has incorrectly analyzed the Appellant's actions as to whether the ultimate result of those actions would have been to the Appellant's benefit when viewed by others. The theft of the morphine is more accurately analyzed through the Appellant's mindset at the time of the theft, and whether she anticipated any benefit or gain. At the time of the drug theft, the Appellant was in emotional and physical

¹⁴ RCW 74.34.020(6)(c).

pain and wanted to commit suicide. By stealing [NAME 1]'s morphine, she gained an opportunity to reduce her pain and carry out her suicide decision. Because the Appellant specifically acquired the morphine in order to gain this opportunity, it must be concluded that she financially exploited [NAME 1].

11. The undersigned has considered the *Initial Order*, the *Petition for Review of the Initial Decision*, the *Response to the Petition for Review of the Initial Decision*, and the entire hearing record. The initial Findings of Fact are modified and adopted as outlined above. Initial Conclusions of Law 1 through 9, cited and applied the governing law correctly and they are adopted and incorporated as conclusions for this decision. Initial Conclusion of Law 10 contained an error of law or was based on an erroneous Finding of Fact and is not adopted as part of this decision. Any arguments in the *Petition for Review of the Initial Decision* that are not specifically addressed have been duly considered, but are found to have no merit, or to not substantially affect a party's rights. The procedures and time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

IV. DECISION AND ORDER

1. The *Initial Order* is **reversed**.
2. The Department's determination that this Appellant **financially exploited** a vulnerable adult is **affirmed**.

Mailed on the 16th day of April, 2012.

THOMAS L. STURGES
Review Judge

Attached: Reconsideration/Judicial Review Information

Copies sent to: [APPELLANT'S NAME], Appellant
Tim Leary, Appellant's Representative
Angela Coats McCarthy, Department's Representative, MS: 40124
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Carolyn Pinkett, ALJ, [CITY] OAH