

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-918

Filed 2 January 2024

Vance County, No. 21-CVS-203

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,
DIVISION OF HEALTH SERVICE REGULATION, Plaintiff,

v.

ANITA D. PEACE, Defendant.

Appeal by plaintiff from order entered 8 July 2022 by Judge Cindy King
Sturges in Vance County Superior Court. Heard in the Court of Appeals 17 October
2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Farrah R.
Raja, for plaintiff-appellant.*

Ajulo E. Othow, for defendant-appellee.

THOMPSON, Judge.

This appeal has resulted from administrative and legal proceedings arising from the entry in the Health Care Personnel Registry of substantiated findings of neglect and abuse of a patient by defendant-petitioner, a health care technician. Plaintiff-respondent agency appeals from the superior court's reversal of its final agency decision to make such entries upon a petition for judicial review in the lower tribunal. Before this Court, plaintiff-respondent raises the following issues: (1)

whether the superior court erred by concluding that defendant-petitioner did not abuse a resident of Murdoch Developmental Center (Murdoch) in Butner within the meaning of 42 C.F.R. § 488.301, as incorporated by reference at 10A N.C. Admin. Code 13O.0101; (2) whether the superior court erred in determining that the Administrative Law Judge (ALJ) did not exceed her statutory authority by placing a burden of proof on plaintiff-respondent in the contested case; and (3) whether there was substantial evidence in the record to support plaintiff-respondent's finding of abuse against defendant-petitioner. After careful review, we hold that the superior court erred in upholding the ALJ's statement of the law regarding the proof of abuse and its improper placement of the burden of proof on plaintiff-respondent. Accordingly, we reverse the order entered by the superior court and remand for further proceedings as described below. In light of these holdings, we do not address plaintiff-respondent's substantial evidence argument as the evidence in this matter will need to be reconsidered on remand under the appropriate legal standards discussed herein.

I. Factual Background and Procedural History

Plaintiff-respondent, the Division of Health Service Regulation, is a division of the North Carolina Department of Health and Human Services and is statutorily required to maintain the North Carolina Health Care Personnel Registry (the Registry), which is a compilation of the names of all unlicensed health care personnel

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working in North Carolina health care facilities against whom plaintiff has substantiated neglect, abuse, misappropriation, diversion of drugs, or fraud. N.C. Gen. Stat. § 131E-256(a)(1) (2021). Pursuant to N.C. Gen. Stat. § 131E-256(d) and (d1), health care personnel who wish to challenge plaintiff's allegations or findings of, *inter alia*, neglect and abuse are entitled to an administrative hearing in the Office of Administrative Hearings (OAH) upon the filing of a petition to initiate a contested case, as provided by the Administrative Procedure Act. In turn, pursuant to N.C. Gen. Stat. §§ 150B-43 and 150B-45 (2021), any party aggrieved by a final decision from OAH is entitled to judicial review by filing a petition for judicial review in superior court.

The record on appeal in this matter reveals the following: Defendant-petitioner was employed at Murdoch as a Health Care Technician I, providing direct care services to sixteen individual residents at Murdoch, each of whom has severe or profound intellectual disabilities. Defendant-petitioner had been employed at Murdoch from 2004 to 2020 and had no disciplinary issues during the time she worked there. In her position, defendant-petitioner had worked closely on a daily basis with D.L., a 71-year-old resident of Murdoch, from the time of his readmission to the facility in 2008 and ongoing to the time of the incident at issue here. D.L. is nonverbal but can provide limited communication through a combination of signs, a communication board, very limited word approximation, facial expressions, and body

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language. D.L. had been diagnosed with profound intellectual disability, other conduct disorders, age-related osteoporosis, osteopenia of the hip, irritable bowel syndrome, and various other physical and psychological disorders. D.L. also wore Saucony brand shoes to accommodate a condition known as bilateral pronation.¹ D.L.'s Behavioral Support Plan (BSP) advised staff of D.L.'s bone health issues and did not allow staff to use therapeutic holds, walks, or carries on D.L. except in extreme emergencies. D.L.'s BSP further prohibited staff from using their feet to move D.L. if he was noncompliant and from removing D.L.'s property in an effort to induce compliance. Defendant-petitioner stated she felt that she and D.L. understood each other based on the years defendant-petitioner had spent caring for D.L., and that she knew when something was wrong with him.

On 4 December 2019, defendant-petitioner was working in a location at Murdoch known as Newport Cottage. Around 9:15 a.m., defendant-petitioner discovered D.L. in the dayroom there. D.L. had stooped and soiled his clothes. When defendant-petitioner asked D.L. to get up so that she could clean and redress him, D.L. would not get up and replied, "No." After several attempts to get D.L. to comply with her requests, defendant-petitioner enlisted the aid of her co-worker, Ian Denson, to lift D.L. from his seat. D.L. "straightened his legs, bore down his weight, and slid

¹ Pronation is a condition in which the weight tends to be more on the inside of the foot when walking. See <https://www.healthline.com/health/bone-health/whats-the-difference-between-supination-and-pronation> (last visited on 4 October 2023.)

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to the floor” where he lay partially on top of one of defendant-petitioner’s feet. D.L. did not respond when defendant-petitioner twice requested that he get up and off of her foot. At that point, defendant-petitioner “moved her legs and feet in a forward motion, kicking D.L.’s body, then pushing or scooting D.L.’s body around the floor with her foot. [Defendant-petitioner] kicked D.L.’s foot or lower leg and pushed his body again with her foot.” Defendant-petitioner testified that she then took D.L.’s shoes and walked to the door of the dayroom because she knew he would get up and follow her if she took them. D.L. stood up, assisted by a male staff member, and followed defendant-petitioner to the bathroom to be cleaned.

The 4 December 2019 incident between defendant-petitioner and D.L. was captured on the facility’s video surveillance. Additionally, there were five other staff members in the dayroom at the time the incident occurred, although only one—Quavella Warren—reported that she saw defendant-petitioner kick D.L. After a facility investigation of the incident, and an interview with defendant-petitioner in which she denied that her foot made physical contact with D.L., the facility found that defendant-petitioner abused D.L. when she struck him with her foot and also found defendant-petitioner to be neglectful of D.L. for taking his shoes. The facility’s findings resulted in a substantiation of physical abuse and neglect against defendant-petitioner and a report of the incident to the Registry; defendant-petitioner was notified by certified letter dated 1 April 2020 of the substantiation of the abuse and

neglect allegations and advised that her name would be placed in the Registry.

On 15 January 2020, defendant-petitioner submitted to the OAH a petition for a contested case hearing against plaintiff-respondent. The hearing was set for 27 August 2020 by the OAH before ALJ Melissa Owens Lassiter. In a final decision issued 8 February 2021, the ALJ affirmed the plaintiff-respondent's decision "to substantiate an allegation of neglect and place such finding of neglect next to [defendant-petitioner's] name on the Health Care Personnel Registry," but reversed plaintiff-respondent's substantiation of the allegation of abuse against defendant-petitioner, finding that plaintiff-respondent "substantially prejudiced [defendant-petitioner's] rights and exceeded its authority or jurisdiction" in so doing. Among the ALJ's conclusions of law and pertinent to the dispositive issue we address in this appeal are the following:

9. On or about December 4, 2019, Petitioner abused a resident of a health care facility when she willfully kicked D.L., a 71-year-old man with intellectual developmental disability and osteoporosis, multiple times while he was lying on the floor. Petitioner willfully inflicted intimidation and punishment on D.L. to get him to get off the floor when he did not wish to do so. . . .

10. The evidence at hearing showed that not all forward movements of the leg or foot are made with the same force, and not all forward movements of the leg or the foot will result in physical harm. Five of the seven forward movements Petitioner made towards D.L. were a softer "scoot" or push of D.L.'s body across the floor. Nonetheless, Petitioner still kicked D.L. with her foot or leg, at least twice, on December 4, 2019. The evidence at hearing

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proved that Petitioner willfully struck D.L., intimidated D.L., and punished D.L. with her foot, regardless of the force used.

11. The second part of the definition of “abuse” only becomes relevant once the willfulness prong is satisfied, and requires that “physical harm, pain, or mental anguish” result from the acts of the Petitioner. In this case, there was no evidence presented at hearing proving that Petitioner’s kicking and/or scooting of D.L.’s body resulted in physical harm, pain, mental anguish, or emotional distress to D.L. Even Ms. Norwood noted in her report that D.L.’s psychologist found “it is difficult to determine” if D.L.’s change in behavior surrounding this incident was a result of the December 4, 2019 incident. Resp. Ex. M. Absent evidence of resulting physical harm, pain, mental anguish, or emotional distress, Respondent failed to prove that Petitioner “abused” D.L. on December 4, 2019 in violation of 10A [N.C. Admin. Code] 13O.0101 and 42 C.F.R. Part 488 Subpart E.

12. A preponderance of the evidence at hearing established that Respondent otherwise substantially prejudiced Petitioner’s rights and exceeded its authority or jurisdiction by substantiating the allegation that Petitioner abused resident D.L. on December 4, 2019 and by listing that finding of abuse by Petitioner’s name on the Health Care Personnel Registry.

Plaintiff-respondent sought judicial review of the ALJ’s reversal as to substantiation of the abuse allegation by filing a petition on 9 March 2021 in the Superior Court, Vance County. Plaintiff-respondent specifically objected to Conclusions of Law 11 and 12 from the ALJ’s final decision, contending that Conclusion of Law 11 contained errors of law and was in excess of the ALJ’s statutory authority, and that Conclusion of Law 12 was an error of law and unsupported by

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substantial evidence in the record. The hearing on plaintiff-respondent's petition took place on 18 April 2022, and on 8 July 2022, the superior court entered its order affirming the ALJ's 8 February 2021 decision, citing the definition of abuse found in 42 C.F.R. § 488.301 and concluding, *inter alia*, that (1) the ALJ's decision to reverse the abuse finding was proper because there was no evidence of resulting physical harm, pain, or mental anguish to D.L.; (2) plaintiff-respondent's argument that the ALJ improperly placed a burden of proof on plaintiff-respondent to provide evidence of physical harm, pain, or mental anguish was meritless; and (3) review of the whole record indicated the ALJ's decision to reverse the abuse finding was supported by substantial evidence because only the first prong of the "abuse" definition was satisfied. Plaintiff-respondent timely appealed on 2 August 2022.

II. Analysis

We find dispositive the first legal error identified by plaintiff-respondent: that the superior court erred in affirming the ALJ's mistaken conclusion that defendant-petitioner did not abuse D.L. within the definition of 42 C.F.R. § 488.301, as incorporated by reference at 10A N.C. Admin. Code 13O.0101. As a result, the superior court order must be reversed, and the case remanded for further proceedings as discussed in more detail below. We are also persuaded by plaintiff-respondent's contention regarding the inappropriate placement of the burden of proof and address that issue as well, in an effort to prevent the error from being repeated on remand.

A. Standard of review

Where a party appeals from the ruling of a superior court sitting in an appellate capacity to review a final agency decision under the Administrative Procedure Act (APA), this Court reviews the superior court's order for errors of law. *Allen v. Dep't of Health & Hum. Servs.*, 155 N.C. App. 77, 80, 573 S.E.2d 565, 567 (2002) (citation omitted), *disc. review denied*, 357 N.C. 163, 580 S.E.2d 358 (2003).

Where an

appellant argues that the agency's decision was based on an error of law, then de novo review is required. . . . This Court's scope of review is the same as that utilized by the [superior] court.

De novo review requires a court to consider a question anew, as if not considered or decided by the agency. In conducting de novo review, the court may freely substitute its own judgment for that of the agency.

Allen, 155 N.C. App. at 80–81, 573 S.E.2d at 567–68 (citations, internal quotation marks, and brackets omitted). “The proper allocation of the burden of proof is purely a question of law.” *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 703, 635 S.E.2d 442, 447 (2006) (citing *Lindsay v. Brawley*, 226 N.C. 468, 471, 38 S.E.2d 528, 530 (1946)), *disc. review denied*, 361 N.C. 220, 642 S.E.2d 445 (2007).

B. Conclusion that defendant-petitioner did not “abuse” D.L.

Plaintiff-respondent first contends that the superior court erred as a matter of law by concluding that defendant-petitioner did not “abuse” D.L. because “controlling

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case law from this Court in *Allen v. Dep’t of Health & Hum. Servs.* . . . indicate[s] that evidence of physical harm, pain, or mental anguish does not have to be admitted at hearing to support a finding of abuse.” We agree.

The definition of abuse that the North Carolina General Assembly has adopted for the purposes of the Registry reads as follows:

Abuse is the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish. Abuse also includes the deprivation by an individual, including a caretaker, of goods or services that are necessary to attain or maintain physical, mental, and psychosocial well-being. Instances of abuse of all residents, irrespective of any mental or physical condition, cause physical harm, pain or mental anguish. It includes verbal abuse, sexual abuse, physical abuse, and mental abuse including abuse facilitated or enabled through the use of technology. Willful, as used in this definition of abuse, means the individual must have acted deliberately, not that the individual must have intended to inflict injury or harm.

42 C.F.R. § 488.301 (2021); *see* 10A N.C. Admin. Code 13O.0101(1) (2021) (“ ‘Abuse’ is defined by 42 C.F.R. Part 488 Subpart E which is incorporated by reference, including subsequent amendments.”). Citing this definition, in the contested case at bar, the ALJ stated that “[t]he second part of the definition of ‘abuse’ only becomes relevant once the willfulness prong is satisfied, and requires that ‘physical harm, pain, or mental anguish’ result. . . . Absent evidence of resulting physical harm, pain, mental anguish, or emotional distress, [r]espondent failed to prove that [p]etitioner ‘abused’ D.L.” We consider de novo whether the superior court and the ALJ applied

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an incorrect definition of “abuse” in this context. *See Allen*, 155 N.C. App. at 84, 573 S.E.2d at 570 (noting that de novo review is appropriate when considering whether, “as a matter of law, [the] petitioner’s statement to [a patient was] not sufficiently egregious to constitute abuse” for purposes of the Registry).

We believe plaintiff-respondent is correct in its assertion that the definition of “abuse” employed by the lower tribunals in this case conflicts with the holding in *Allen*, an appeal in which this Court addressed the issue raised by plaintiff-respondent and which is therefore binding in our resolution of this question here. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”).

In *Allen*, the petitioner, a certified nurse aide working at a nursing home, was overheard to say to an uncooperative and combative patient, “If you kick me, I will knock the f--king hell out of you.” *Id.* at 78–79, 573 S.E.2d at 566 (alteration in original). During the ensuing investigation of the incident, the petitioner denied making that remark and instead testified that she had actually told the patient either “You’ve kicked the hell out of my hand and, if you kick me again, I’m going to have to pinch your foot off” or “If you kick me in the face, little girl, I just don’t know what I might have to do to you.” *Id.* at 79–80, 573 S.E.2d at 567.

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After concluding that the “petitioner verbally abused [the patient] by stating, ‘You’ve kicked the hell out of me and if you do it again I’ll have to pinch your foot off,’ DHHS notified the petitioner that an allegation of abuse had been substantiated against her, and that the substantiated allegation would be entered into the . . . Registry.”² *Id.* at 80, 573 S.E.2d at 567. The petitioner filed a petition for a contested case, and the ALJ upheld the Agency decision, as did the superior court upon judicial review. *Id.*

In considering the petitioner’s appeal from the superior court order, this Court considered, *inter alia*, whether the petitioner’s statement to the patient was “sufficiently egregious to constitute abuse” under the definition provided in 42 C.F.R. § 488.301 (“ ‘Abuse’ means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish”)—the same definition as we consider in this appeal. *Id.* at 84, 573 S.E.2d at 569–70. This Court began by noting that, “in the context of this extremely regulated profession and the patient’s dependency on a person in the trusted position of nurse aide, the definition of abuse may fairly be understood to reach behavior short of more flagrant forms dealt with in other settings.” *Id.* at 85, 573 S.E.2d at 570 (citation and

² The petitioner in *Allen*, as a nurse aide, was subject to potential findings in both the Nurse Aide Registry and the Health Care Personnel Registry. *Id.* at 78–79, 573 S.E.2d at 567. Defendant-petitioner here, a health care technician, contests only a finding being noted in the Health Care Personnel Registry. However, both Registries incorporate the same definition of “abuse” as found in 42 C.F.R. § 488.301. *See* 10A N.C. Admin. Code 13O.0101.

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quotation marks omitted). Although it appears that there was no evidence introduced at any level of the proceedings regarding the impact of petitioner's remark on the patient—whether physical or emotional—the Court held:

Though the record discloses various accounts of the exact statement made to [the patient] by [the] petitioner, the evidence is uncontroverted that [the] petitioner made some statement of a threatening nature to her patient *While there was no evidence of record that petitioner's threats resulted in physical harm or pain to [the patient], [the] petitioner's threat to do violence to the elderly Alzheimer's patient is certainly sufficient evidence from which a rational factfinder could determine it was such as to cause that patient "mental anguish."*

Id. at 88, 573 S.E.2d at 572 (emphasis added). "Accordingly, [the Court] conclude[d] that DHHS properly determined that [the] petitioner's actions constituted abuse within the meaning of 42 C.F.R. § 488.301 (as incorporated by reference at 10 [N.C. Admin. Code] 3B.1001(1))." *Id.* In other words, even in the absence of direct evidence of any harm sustained by a patient, the "willful infliction of injury" by a health care professional to a patient was held sufficient to sustain an inference that mental anguish would have been suffered by the patient as a result and therefore to substantiate abuse for purposes of an entry in the Registry.

We find this binding precedent controlling in our resolution of this matter. Defendant-petitioner acknowledges that *Allen* "is on point" but emphasizes that it does not stand for the proposition that a factfinder "must find abuse as a matter of law." We agree that nothing in *Allen* requires a conclusion of abuse in the absence of

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evidence of the specific harms noted in the pertinent definition; however, under *Allen*, in such absence, the defined harms *may be inferred*. Yet, the ALJ in its Conclusion of Law 11 twice stated that evidence of the listed harms is required to prove abuse for purposes of the Registry:

[t]he second part of the definition of “abuse” . . . *requires that “physical harm, pain, or mental anguish” result from the acts of the Petitioner*. In this case, there was no evidence presented at hearing proving that Petitioner’s kicking and/or scooting of D.L.’s body resulted in physical harm, pain, mental anguish, or emotional distress to D.L. . . . *Absent evidence of resulting physical harm, pain, mental anguish, or emotional distress*, Respondent failed to prove that Petitioner “abused” D.L. on December 4, 2019 in violation of 10A [N.C. Admin. Code] 13O.0101 and 42 C.F.R. Part 488[.301] Subpart E.

(Emphasis added.) This conclusion misstates the law, as under *Allen*, even where there is “no evidence of record that petitioner’s threats resulted in physical harm or pain to [the patient], [the] petitioner’s [willful infliction of injury] is certainly sufficient evidence from which a rational factfinder *could* determine it was such as to cause that patient ‘mental anguish.’ ” *Id.* at 88, 573 S.E.2d at 572 (emphasis added). Because the ALJ in this case appears to have acted under a misapprehension of the law regarding what *must* be shown to prove abuse for purposes of an entry in the Registry, we cannot know whether the ALJ *could* have inferred mental anguish or some other listed harm to D.L. if the ALJ had understood that such an inference was permitted. This legal error is particularly concerning here in light of the ALJ’s

findings that D.L. is non-verbal and thus it was difficult to determine whether his observed behavioral changes after the incident at issue were caused by the incident and given that defendant-petitioner agreed that she had “more or less” threatened D.L. during the incident.

In turn, in its review, the superior court compounded this error by failing to recognize the import of *Allen* as precedent on this point. We therefore must reverse the superior court’s order and remand the matter to the superior court for further remand to the ALJ to reconsider defendant-petitioner’s petition under the proper legal authorities and precedent, and to make the appropriate findings of fact under the controlling law on which the court can then base conclusions of law.³

C. Burden of proof

While our resolution of plaintiff-respondent’s first argument requires that we reverse the superior court’s order and remand for legally correct proceedings by the ALJ, we briefly address plaintiff-respondent’s contention that the superior court erred in its Conclusion of Law 14 when it rejected plaintiff-respondent’s “argument that the ALJ improperly placed the burden of proof upon [plaintiff-respondent] to . . . provide evidence supporting this second prong of the definition of ‘abuse’” in an effort to prevent the recurrence of this additional error on remand. *See State v.*

³ While fully equipped to consider and resolve arguments of errors of law upon appeal, this Court does not find facts. *See Pharr v. Atlanta & C. Air Line Ry. Co.*, 132 N.C. 418, 423, 44 S.E. 37, 38 (1903) (holding that appellate courts “cannot find facts”).

Womble, 277 N.C. App. 164, 183, 858 S.E.2d 304, 318 (2021), *appeal dismissed and disc. review denied*, 380 N.C. 679, 868 S.E.2d 865 (2022).

Beginning at the initial source of this error of law, in her final decision, the ALJ made several conclusions of law concerning the abuse allegation, noting the two prongs of abuse as defined in 42 C.F.R. § 488.301: (1) a “willful infliction of injury, unreasonable confinement, intimidation, or punishment” that (2) results in “physical harm, pain, or mental anguish.” While the ALJ agreed with plaintiff-respondent that the first prong was satisfied in that “[defendant-p]etitioner willfully inflicted intimidation and punishment on D.L. to get him to get off the floor when he did not wish to do so,” as noted above in Conclusion of Law 11, the ALJ stated that the second prong was not satisfied because “there was no evidence presented at the hearing proving that [defendant-p]etitioner’s kicking and/or scooting of D.L.’s body resulted in physical harm, pain, mental anguish, or emotional distress” and as a result, “[plaintiff-r]espondent failed to prove that [defendant-p]etitioner ‘abused’ D.L. . . .”

While we generally assume that judges know and follow the law, *see State v. Bell*, 166 N.C. App. 261, 266, 602 S.E.2d 13, 16–17 (2004) (holding that an appellate court is “bound by the record before it,” and where the record is void of anything indicating otherwise, we will assume the trial judge correctly applied the law and ruled appropriately) (quoting *State v. Williams*, 304 N.C. 394, 415, 284 S.E.2d 437, 451 (1981), *cert. denied*, 456 U.S. 932 (1982)), this explicit statement by the ALJ in

her final decision that she placed the burden on *respondent* to prove abuse by petitioner against D.L. is directly counter to relevant provisions of the APA as set forth by the legislature.

The APA provides that in a contested case the *petitioner* must “state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner’s rights and that the agency[, *inter alia*, e]xceeded its authority or jurisdiction.” N.C. Gen. Stat. § 150B-23(a)(1) (2021). Further, “[e]xcept as otherwise provided by law or by this section, *the petitioner in a contested case has the burden of proving the facts alleged in the petition* by a preponderance of the evidence.” N.C. Gen. Stat. § 150B-25.1(a) (2021) (emphasis added). *See also House of Raeford Farms, Inc. v. N.C. Dep’t of Env’t & Natural Res.*, 242 N.C. App. 294, 304, 774 S.E.2d 911, 918, *disc. review denied*, 368 N.C. 429, 778 S.E.2d 92 (2015) and *Overcash*, 179 N.C. App. at 704, 635 S.E.2d at 447.⁴

In its petition for judicial review by the superior court as provided in N.C. Gen. Stat. § 150B-43, plaintiff-respondent noted the ALJ’s failure to comply with § 150B-25.1(a) in regard to the placement of the burden of proof in the contested case. The APA provides that on judicial review, an agency’s final decision may be reversed or

⁴ “The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence.” N.C. Gen. Stat. § 150B-29(a) (2021).

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modified “if the reviewing court determines that the petitioner’s substantial rights may have been prejudiced because the agency’s . . . conclusions” fall into one of the six categories listed in N.C. Gen. Stat. § 150B-51(b) (2021), one of which is being “[i]n excess of the statutory authority or jurisdiction of the agency or administrative law judge.” *N.C. Dep’t of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 658–59, 599 S.E.2d 888, 894 (2004) (quoting N.C. Gen. Stat. § 150B-51(b)(2)). Such considerations, including “[t]he proper allocation of the burden of proof,” are questions of law to be considered de novo. *Overcash*, 179 N.C. App. at 703, 635 S.E.2d at 447; *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894.

In its order on judicial review, the superior court noted that plaintiff-respondent had raised the issue that “the ALJ improperly placed the burden of proof” on plaintiff-respondent and addressed this contention in Conclusion of Law 14. Conclusion of Law 14 reads, in its entirety:

As to [plaintiff-respondent’s] argument that the ALJ improperly placed the burden of proof upon [plaintiff-respondent] to show D.L. suffered physical harm, pain, mental anguish, or emotional distress, the [c]ourt *finds it illogical for [defendant-petitioner] to have to provide evidence supporting this second prong of the definition of “abuse.”* The [c]ourt *also finds it illogical for the ALJ to require [defendant-petitioner] to have to prove a negative, i.e., that D.L. did not suffer physical harm, pain, mental anguish, or emotional distress.* The [c]ourt finds and concludes [plaintiff-respondent]’s argument as to this burden of proof issue is meritless.

(First two emphases added.)

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Regardless of the superior court's opinion on the matter, the legislature has specifically directed that "the petitioner in a contested case has the burden of proving the facts alleged in the petition by a preponderance of the evidence." N.C. Gen. Stat. § 150B-25.1(a). The ALJ failed to follow this explicit directive, therefore exceeding her statutory authority, and the superior court then compounded this error by substituting its own belief about the proper allocation of the burden of proof and rejecting plaintiff-respondent's appellate argument on that basis, thereby violating N.C. Gen. Stat. § 150B-51(b). On remand, the ALJ should take care to place the burden of proof in accord with the applicable authority.

III. Conclusion

The superior court's order upholding the ALJ's final decision is reversed, and the matter is remanded to the superior court for further remand to the ALJ for further proceedings not inconsistent with this decision.

REVERSED AND REMANDED.

Judge CARPENTER concurs.

Judge HAMPSON concurs in result only.