

IN THE COURT OF APPEALS OF IOWA

No. 17-0159
Filed November 22, 2017

MICHAEL E. BOS,
Petitioner-Appellee/Cross-Appellant,

vs.

CLIMATE ENGINEERS, INC., and THE HARTFORD FIRE INSURANCE,
Respondents-Appellants/Cross-Appellees.

Appeal from the Iowa District Court for Linn County, Mary E. Chicchelly,
Judge.

Employee and employer cross-appeal from district court order on workers'
compensation benefits. **REVERSED ON APPEAL; AFFIRMED ON CROSS
APPEAL.**

Timothy W. Wegman and Joseph M. Barron of Peddicord Wharton, LLP,
West Des Moines, for appellants.

Thomas M. Wertz and Daniel J. Anderson of Wertz, Dake & Anderson,
Cedar Rapids, for appellee.

Considered by Danilson, C.J., and Tabor and McDonald, JJ.

MCDONALD, Judge.

Michael Bos was employed by Climate Engineers, Inc., as a pre-apprentice sheet metal worker. During the course of his employment, he sustained a work-related left shoulder injury. The injury required surgery and physical therapy. Bos sought and obtained workers' compensation benefits. Both parties sought judicial review of the agency's decision. The district court affirmed the agency's finding with respect to Bos's benefits. The district court concluded an expert witness report was improperly admitted into evidence and remanded the case to the agency for reconsideration without the improperly admitted evidence. Both parties appeal the district court's decision.

I.

In October 2012, Bos suffered a work-related injury to his left shoulder while moving plywood. He reported the injury to his employer and sought medical assistance at a local emergency room. Subsequently, Bos treated with orthopedic surgeon Dr. James Pape, who had previously treated Bos for a dislocation of the same shoulder. In January 2013, Dr. Pape performed a left shoulder arthroscopy with labral repair and left shoulder anterior capsular plication. Following the surgery, Bos was on leave. He engaged in physical therapy until June 10, 2013, when he was discharged. He did not return to work, and Climate Engineers terminated his employment on June 14.

Bos continued to seek medical treatment following the cessation of his employment. Bos developed a left inguinal hernia and had surgery on June 27. From July to November 2013, Bos continued to treat with Dr. Pape. In December, Dr. Pape referred Bos to a pain clinic for further evaluation. In the same December,

Bos saw his primary care physician, Dr. Beer, and reported he was feeling depressed because of various stressors in his life. The stressors included the inability to return to work and concomitant financial issues. Dr. Beer prescribed Cymbalta. Dr. Beer characterized Bos's depression as moderate. A letter Dr. Beer later drafted concluded:

Overall, regarding Mr. Bos's anxiety/depression, if his shoulder condition were to improve, I would anticipate his anxiety and depression would also improve. Commonly, patients who suffer injuries that lead to disability, even if there is no underlying depression/anxiety, will develop depression/anxiety. In patients with underlying depression and anxiety, the symptoms are often more severe and debilitating.

Dr. Beer also wrote in the same letter Bos's depression was "clearly exacerbated by the accident . . . and the resulting restrictions and limitations that occurred."

The workers' compensation case came on for a contested hearing regarding Bos's claim for industrial disability benefits. Bos received two independent medical examinations. Dr. David Tearse opined Bos had a 6% whole-person impairment and assigned permanent work restrictions. Bos also received an independent medical examination from Dr. Mark Taylor. Dr. Taylor assigned Bos a 7% whole-person impairment rating and similar permanent work restrictions. Dr. Taylor also cautioned Bos against "climbing extension or vertical ladders due to the residual left shoulder symptoms." In addition to the independent examinations, Dr. Pape assigned Bos a 6% impairment rating.

Two vocational experts provided expert opinions. Bos was thirty-three years old at the time of the hearing. His education history included the completion of high school and some college courses. His work history is primarily construction and maintenance. He holds a chauffeur's license and a forklift-operator

certification. Kent Jayne submitted a report on behalf of Bos. Jayne's report concluded Bos's "reduced ability to use his upper extremities, and his limited ability to perform manual dexterity, fine motor coordination, and minimal clerical skills" along with his work restrictions "would preclude him from nearly all jobs within his previous capacities in the labor market." According to Jayne, Bos "has no marketable transferable skills at his current level of abilities as understood." The deputy commissioner did not credit Jayne's opinion because Jayne "did not consider [Bos's] complete work history in rendering his opinions."

On behalf of Climate Engineers, James Carroll provided the other vocational expert opinion. Carroll found the restrictions imposed by Dr. Tearse and Dr. Taylor placed Bos within the medium physical demand level. Carroll considered Bos's complete work history. Carroll found Bos's restrictions resulted in a loss of employability of 29% and loss of access to 20% of the job market. If two variables were added—not being able to drive a work vehicle and not being able to operate machinery—Carroll concluded the loss of employability increased to 35% and the loss of access to the job market increased to 72%. Carroll determined Bos's loss of earning capacity was 22%.

Bos objected to the admission of Carroll's report because Carroll had not been timely designated as an expert and because the report was not timely served. Timely disclosure requires a report be served thirty days in advance of hearing. Iowa Administrative Code rule 871-4.19(3)(d) provides if evidence is disclosed untimely, "the evidence will be excluded if the objecting party shows that receipt of the evidence would be unfairly prejudicial." It is unclear when Carroll's report was served, but the report was prepared August 22, 2014, and the relevant hearing

was held September 9, 2014, less than twenty days later. At the hearing, Climate Engineers argued the vocational expert it had originally designated had been unable to conduct an assessment, and it had needed to hire a second expert. Climate Engineers also argued there was no unfair surprise because Climate Engineers had timely designated a vocational expert, just not this particular expert. The deputy commissioner admitted the opinion, noting, "it all boils down to prejudice, which I'm not finding." In concluding the report should be admitted, the deputy commissioner gave Bos thirty days to submit a responsive opinion from a vocational expert. Bos did not submit any responsive opinion.

The agency did award Bos industrial disability benefits. The deputy commissioner found Bos had sustained a 40% industrial disability. The deputy commissioner awarded Bos medical expenses, including expenses related to treatment for anxiety and depression. On intra-agency appeal, the commissioner found Bos had suffered a 40% industrial disability. Before the commissioner, Bos asserted the deputy had been incorrect to ignore Bos's "work-related depression," noting Dr. Beer had treated him for anxiety and depression. On this topic, the commissioner found:

[Bos] received pharmacological treatment for anxiety and depression prior to his work injury from his primary care physician, Dr. Beer. [Bos] also received pharmacological treatment from Dr. Beer after his work injury. [Bos] has not received an evaluation or treatment from a psychologist, psychiatrist, or counselor since his October 2012 left shoulder injury. He has not received any counseling or psychotherapy. Drs. Pape, Taylor, and Tearse did not provide any opinions regarding a connection between [Bos's] employment and his anxiety or depression, nor did they provide any work restrictions related to anxiety or depression. No physician or mental health provider has opined [Bos] has any permanent impairment or restrictions related to his mental health conditions. The deputy commissioner correctly rejected [Bos's] assertion.

The commissioner also concluded the deputy had not abused his discretion in admitting Carroll's report. Bos sought rehearing. On rehearing, the commissioner's findings were affirmed. The commissioner again found the deputy had not abused his discretion in admitting Carroll's report because the deputy stated the report "had little use" and gave Bos an opportunity to "offset any prejudice." As to Dr. Beer, the commissioner wrote:

Dr. Beer specializes in family medicine. His pronouncement that individuals who have injuries that lead to disability ultimately have mental health problems is unsupported in the record. Such a position would result in most cases before this agency resulting in mental claims. Dr. Beer has no explanation why [Bos's] depression disorder went unreported for nearly a year after the date of injury. Given this record, it is found the opinions of Dr. Beer are not convincing.

Bos sought judicial review. The district court concluded "the agency's conclusion that [Bos] failed to prove his alleged mental condition is causally related to his work injury is supported by substantial evidence." The court noted Dr. Beer's expert testimony—that Bos's anxiety and depression were related to his work injury—was uncontroverted but found the commissioner nonetheless provided "adequate reasons" to reject it. Those reasons included "that it was several months from the time of injury that [Bos] reported his depression and anxiety to a doctor; that [Bos] was not receiving treatment or counseling for depression/anxiety, aside from receiving medication prescribed by Dr. Beer; and that there was no testimony other than that offered by Dr. Beer to support a finding that the depression/anxiety was related to the work injury." The district court, however, concluded the admission of Carroll's report was unfairly prejudicial to Bos and

remanded the case on that basis to the commissioner “with instructions to evaluate [Bos’s] claim with the exclusion of Mr. Carroll’s report.” Both parties now appeal.

II.

Dr. Beer provided an expert opinion to the effect that Bos suffered moderate depression exacerbated by his physical injury and that Bos’s mental condition would improve if his physical condition were to improve. At the agency level, no weight was given to this opinion. The district court ruled the agency’s finding Bos failed “to prove his alleged mental condition is causally related to his work injury [was] supported by substantial evidence.” Bos challenges that finding, asserting his mental-health condition is causally related to his work injury.

“Whether an injury has a direct causal connection with the employment or arose independently thereof is essentially within the domain of expert testimony.” *Dunlavey v. Econ. Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). The commissioner may decide how much weight to give such an opinion, a decision “that may be affected by the completeness of the premise given the expert and other surrounding circumstances.” *Id.* Whether to credit the expert’s opinion is within the “peculiar province” of the commissioner. *Deaver v. Armstrong Rubber Co.*, 170 N.W.2d 455, 464 (Iowa 1969). “We will therefore only disturb the commissioner’s finding of medical causation if it is not supported by substantial evidence.” *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011). On substantial-evidence review, we do not substitute our own judgment but only consider whether the conclusion reached is supported by substantial evidence. *See Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330, 337 (Iowa 2008) (“Just because the interpretation of the evidence is open to a fair difference

of opinion does not mean the commissioner's decision is not supported by substantial evidence. An appellate court should not consider evidence insubstantial merely because the court may draw different conclusions from the record.").

Here, we have little trouble concluding the agency's finding of no causation is supported by substantial evidence. When one party offers uncontroverted evidence, the finder of fact is still free to dismiss the evidence for a lack of credibility provided the fact finder does not "arbitrarily or totally reject the offered" evidence. *Langford v. Kellar Excavating & Grading, Inc.*, 191 N.W.2d 667, 669 (Iowa 1971). When the commissioner rejects uncontroverted expert medical opinions, the commissioner must provide valid reasons for so doing. See *Sondag v. Ferris Hardware*, 220 N.W.2d 903, 908 (Iowa 1974); *Leffler v. Wilson & Co.*, 320 N.W.2d 634, 637 (Iowa Ct. App. 1982) (Carter, J., dissenting). Here, the commissioner found Dr. Beer's opinion on causation was not persuasive. Bos sought pharmacological treatment for anxiety and depression prior to his work injury. Dr. Beer was Bos's primary physician and not an expert in the field of mental health. Bos did not obtain an evaluation from a psychologist, psychiatrist, or counselor after the shoulder injury and did not seek treatment with any mental health professionals. Further, Drs. Pape, Taylor, and Tearse did not make any connection between Bos's injury and his anxiety or depression.

"The administrative process presupposes judgment calls are to be left to the agency." *McComas-Lacina Constr. v. Drake*, No. 15-0922, 2016 WL 2744948, at *1 (Iowa Ct. App. May 11, 2016). "The legislature has 'vested the commissioner with the discretion to make factual determinations.' Our court is bound by these

factual determinations ‘if they are supported by substantial evidence in the record before the court when the record is viewed as a whole.’” *Id.* (citation omitted). Our court may consider evidence as substantial even if we may have made a different finding than the agency on the same record. *See id.* It is thus a rare case in which we will reverse an agency’s finding for lack of substantial evidence. This is not one of those rare cases.

III.

Climate Engineers argues the district court erred in reversing the deputy commissioner’s admission of Carroll’s vocational report. Rulings on a report’s admissibility are within the discretion of the agency. *See Trade Prof’ls, Inc. v. Shriver*, 661 N.W.2d 119, 123 (Iowa 2003). We may reverse if we find an abuse of discretion. *See* Iowa Code § 17A.19(10) (2016). “An abuse of discretion occurs when the commissioner’s exercise of discretion is ‘clearly erroneous or rests on untenable grounds.’” *IBP, Inc. v. Burress*, 779 N.W.2d 210, 214 (Iowa 2010) (citation omitted). “[A]buse of discretion is synonymous with unreasonableness, and involves lack of rationality, focusing on whether the agency has made a decision clearly against reason and evidence.” *Schoenfeld v. FDL Foods, Inc.*, 560 N.W.2d 595, 598 (Iowa 1997).

The agency did not abuse its discretion in admitting Carroll’s report into evidence over Bos’s objection. Untimely disclosed and served evidence should be excluded “if the objecting party shows that receipt of the evidence would be unfairly prejudicial.” Iowa Admin. Code r. 876-4.19(3)(e). Climate Engineers disclosed a vocational expert, but it was required to find a different expert on short notice. Bos had notice of the subject matter of the evidence and was not unfairly

surprised by the change in the identity of the expert. See *Trade Prof'ls*, 661 N.W.2d at 122 (considering surprise related to admission of late-filed report); *Morris v. State ex rel. Wyo. Workers' Safety & Compensation Div.*, 276 P.3d 399, 407 (Wyo. 2012) (considering inadvertence as a factor in admitting late-filed expert's report). In addition, the agency offered Bos thirty days to file a reply to the vocational report. Bos declined the offer. The offer of additional time to rebut the report eliminated any prejudice from the late disclosure. See *Trade Prof'ls*, 661 N.W.2d at 123 ("We believe, in light of the thirty days allowed the employer to rebut the report, the admission of the report was not an abuse of discretion.").

On these facts, we decline to say admitting Carroll's report was unfairly prejudicial. For that reason, remand to the agency is not necessary, and we reverse the judgment of the district court.

IV.

We affirm the district court's conclusion the agency's finding Bos failed "to prove his alleged mental condition is causally related to his work injury [was] supported by substantial evidence." We reverse the district court's decision to reverse the deputy commissioner's admission of Carroll's vocational report. We affirm the agency's final action.

REVERSED ON APPEAL; AFFIRMED ON CROSS-APPEAL.