IN THE COURT OF APPEALS OF IOWA

No. 9-117 / 08-1159
Filed April 22, 2009

M.S.,
Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF HUMAN SERVICES,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

M.S. appeals from a district court judicial review ruling affirming the finding that he committed child abuse and placing the finding on the Central Abuse Registry. **AFFIRMED.**

David A. Morse and Kristine M. Dreckman of Rosenberg, Stowers & Morse, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Charles Phillips, Assistant Attorney General, for appellee.

Heard by Vaitheswaran, P.J., and Eisenhauer and Doyle, JJ.

DOYLE, J.

M.S. appeals from a district court judicial review ruling affirming the finding that he committed child abuse and placing his finding on the Central Abuse Registry. He contends the agency's final decision was not supported by substantial evidence as required by law. We affirm.

***I. Background Facts and Proceedings*.**

M.S. is the father and P.S. is the mother of L.S., born July 1991. The parents divorced when L.S. was approximately one year old, and the parents have had a strained relationship since. The parents share joint custody of L.S., with P.S. as the primary custodian. M.S. has lived various places across the country since the divorce. Both P.S. and L.S. reside in Iowa. M.S. has another child from an earlier marriage, E.G., born November 1981, who also resides in Iowa. L.S. regularly visited M.S. for two weeks during the summer and around holidays, and M.S. would sometimes visit L.S. in Iowa. When L.S. visited M.S., E.G. would generally accompany L.S. on the visit.

In 2005 L.S. began to display symptoms of sleep disturbance, feelings of alienation, depression and anxiety, emotional numbness, compulsive behavior, and was out of control and irritable. L.S. has been hospitalized a number of times and has been referred to mental health professionals. While L.S. was in a partial hospitalization program in January 2006, she told her mother that M.S. had sexually abused her when she was nine years old.

On January 4, 2006, the Iowa Department of Human Services (Department) received a report that L.S. had been sexually abused by M.S., and an assessment was initiated. On January 17, 2006, a forensic interviewer

conducted an interview with L.S., and the interview was video recorded. On the recording L.S. stated that when she was approximately nine years old and visiting M.S. in Maryland, M.S. exposed his penis to her and made her touch it. L.S. stated she told her father she did not want to touch his penis, and he began screaming at her. She stated she ran away and locked herself in another room. She stated E.G. was also visiting M.S. at that time, but that E.G. was downstairs and not present when the incident occurred. She also stated in the interview that this was the only time she had been sexually abused by M.S. After the interview, a colposcopic exam was performed on L.S., and the results were found to be normal.

The Department's child protection worker assigned to the case referred the report to Maryland law enforcement authorities on or about January 20, 2006. The worker requested their assistance in setting up an interview with M.S. However, the worker received no response from the Maryland authorities she contacted. On February 1, 2006, under a deadline to complete the written assessment, *see* Iowa Code § 232.71B(12)(b) (2005), the Department determined the allegation of sexual abuse in the second degree against M.S. was confirmed, without having interviewed M.S. The Department's decision was based on the following factors:

> Factor 1: [L.S.] is a child as evidenced by her date of birth, [July 1991].
> Factor 2: [M.S.] is the biological father and was caretaker for [L.S.] at the time of the alleged abuse.
> Factor 3: [M.S.] committed a sex act to [L.S.] [L.S.] reported that her father took his penis out of his boxers and showed it to her. [M.S.] made [L.S.] touch the tip of his penis with her hands.
> Factor 4: [L.S.] was under the age of [twelve], at the time the incident occurred.

The Department further determined the abuse met the criteria for placement on the Central Abuse Registry. *See* Iowa Code § 232.71D. The Department then sent notice of its assessment to M.S.

On January 24, 2006, L.S. began seeing therapist Maureen Dion, Ed.D. In March 2006 L.S. was referred to Mary Pulcher, a therapist who specializes in art therapy. Both therapists diagnosed L.S. as suffering from posttraumatic stress disorder. Over a period of months, L.S. reported to her therapists additional instances of sexual abuse by her father, including that her father had forced her to have oral sex with him, that he had licked her breasts, that he had performed oral sex upon her, and that he had penetrated her vagina with his penis and her anus with a finger.

On May 16, 2006, M.S. was interviewed by the Department's child protection worker regarding the alleged abuse. He denied ever abusing L.S. in any way and provided an affidavit from E.G. stating, among other things, that M.S. had not assaulted or abused her in any way and that M.S. was always fully clothed when around her and L.S. E.G. also stated that the rooms L.S. described as where the alleged sexual abuse had occurred did not have locks, and that she had never heard her father screaming at L.S., contradicting parts of L.S.'s initial report.

Thereafter, the Department's child protection worker spoke with L.S.'s therapists. Dr. Dion reported to the worker that there was no doubt that L.S. had real memories. Dr. Dion viewed L.S. to be a credible witness. Both therapists suggested that L.S. be re-interviewed.

On June 12, 2006, L.S. was re-interviewed by the forensic interviewer, and the interview was video recorded. On this recording, L.S. stated that, in addition to the previous abuse she had revealed, her father had also made her perform oral sex upon him numerous times in different locations, starting when she was approximately five years old. L.S. stated she did not disclose this in the first interview because she was in shock; she had just told her mother and did not know she would be coming in. In addition to the sexual abuse she related at this interview, L.S. stated that there were additional incidents of sexual abuse but she could not talk about it at that time. The Department then issued an addendum to its assessment, stating the information contained in L.S.'s re-interview did not change the finding of its initial report.

M.S. appealed. A contested hearing before an administrative law judge (A.L.J.) was held on August 22, 2007. There, the State introduced into evidence the videotape recordings of L.S.'s interviews, along with the testimony of L.S.'s therapists and the Department's child protection worker. L.S.'s therapists both testified that L.S.'s allegations were consistent and emotionally congruent. The therapists did not think L.S. was lying to them or that she had been coached to repeat the information. Both therapists testified that the fact L.S. first stated there was only one incident, but later revealed more incidents was common and did not make her less credible. The Department's child protection worker had viewed the videotapes and formed her own favorable opinion about L.S.'s credibility.

M.S. and E.G. also testified. M.S. denied the alleged abuse. M.S. testified that L.S. had been troubled for quite some time, and had been seeing

therapists since she was very young. E.G. testified she generally visited M.S. with L.S., and that L.S. was never alone with M.S. when she was present. E.G. further testified that she had lived in the Maryland house where L.S. alleged M.S. had abused her for a summer, and that there were no locks on any of the doors. Additionally, she testified that M.S. had never sexually abused her.

On September 18, 2007, the A.L.J. issued his proposed decision reversing the Department's finding. The A.L.J. found that the Department's conclusion that M.S. had sexually abused L.S. was not based upon direct evidence, as "[t]here were no witnesses to these events. L.S. did not testify. No medical evidence disclosed evidence of sexual abuse." The A.L.J. determined "the reasonably prudent person . . . would require some corroborative evidence of abuse or at least some evidence giving rise to a heightened sense of trust in L.S.'s statements."

The Department relied on at least two other bodies of evidence for reaching the conclusion M.S. abused L.S., the first was testimony given by L.S.'s therapists and the second was the videotaped statements L.S. made to the forensic investigator. The A.L.J. noted "the therapists did not try to confirm anything L.S. told them by going outside her story, reviewing documents, or talking to other people that might have knowledge of these matters," but recognized that "[t]heir interest was in trying to help L.S. become emotionally healthy, and that depended on their acceptance of what L.S. thought her problems were." They took L.S.'s statements at face value. Additionally, in her videotaped interview with the forensic investigator, L.S. did not disclose information other than what she already had disclosed to her therapists, but the

tapes did show her demeanor as she spoke for herself about the events. The forensic investigator formed her own favorable opinion about L.S.'s credibility. The A.L.J. found a reasonably prudent person would not rely upon L.S.'s statements in the interviews to conclude that M.S. had sexually abused L.S., explaining:

> That is not to say that the therapists were wrong in diagnosing L.S. as suffering from [post traumatic stress disorder]. One has only to watch the . . . interviews to understand that this young woman is troubled.
>
> But the reasonably prudent person . . . would also have to account for a [father] who denied having done what L.S. said he did and another daughter who gave a description of the physical premises in which the abuse is supposed to have occurred that contradicted L.S.'s description of those same premises. E.G.'s description showed that these incidents would have taken place in places where no privacy could be maintained. E.G., a mature adult, denied having been sexually abused by [M.S.]. Why would [M.S.] abuse L.S. but not E.G.? Why did E.G. give evidence that cast doubt on her own sister's statements? The record did not explain these matters.
>
> Further, the manner in which L.S. made additions to her allegations as the months went by may have been insignificant clinically to therapists, but it did not inspire confidence in the factfinder. Rather, it highlighted the fact that the record contained no firm picture of L.S.'s overall mental health against which to set these particular statements and make a satisfactory credibility analysis.
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> L.S.'s progressive revelations also underscored the fact that no one critically examined the statements she was making along the way to attempt to determine whether L.S. was relating objective facts. This is not to say that her therapists were required to perform that function in the course of treating L.S. But the law requires that facts be found on the basis of reasonable evidence which is weighed in a prudent manner. The uncritical acceptance of L.S.'s statements by one and all as being true without attempting to verify very much about what she said detracted from the weight that could be accorded to such evidence.

The A.L.J. then concluded the resolution of the facts in controversy did not support the Department's conclusion that M.S. sexually abused L.S. and reversed the Department's finding.

The Department sought review of the A.L.J.'s proposed decision. On November 2, 2007, the Department's deputy director for field operations entered the agency's final decision, reversing the A.L.J.'s proposed decision. The final decision found that:

> [A] reasonably prudent person would give great weight to the opinions of the two therapists and the experienced [child protection worker], all of whom initially believed and continue to believe that L.S. is telling the truth about what happened to her.
>
> The therapists believe that the child had no reason to lie and that she was not coached to lie. There is no evidence which establishes a reason for L.S. to lie. Therefore, her allegations are believable. The [child protection worker], depending on her experience, technical competence, and specialized knowledge, supported by the opinions of therapists, made the decision that [the] child abuse report should be confirmed and founded and placed on the Central Abuse Registry.
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> But a reasonably prudent person would also have to account for [a father] who denied having done what L.S. said he did and another daughter [E.G.] who gave a description of the physical premises in which the abuse is supposed to have occurred that contradicted L.S.'s description of those premises.
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> Just as there was no direct evidence that [M.S.] sexually abused his daughter, neither was there direct evidence to the contrary. [M.S.] offered no corroborative testimony other than that of his other daughter [E.G.].
>
> [M.S.] has an interest in the proceeding and his witness has an interest in protecting him, considering the unfavorable consequences he would experience under a confirmed and founded child abuse report on the Central Abuse Registry. It is noted . . . that L.S. believed that [E.G.] would be motivated to protect her father if asked about the situation.

The deputy director then found that a preponderance of the evidence supported the Department's finding, and affirmed the Department's decisions to deny

correction or expungement of the child abuse report and affirmed placement of the report on the Central Abuse Registry.

On July 18, 2008, M.S. sought judicial review of the final decision, asserting that substantial evidence did not support the decision. The district court disagreed, finding substantial evidence, and dismissed M.S.'s petition for judicial review.

M.S. appeals.

II. Scope and Standards of Review.

The Iowa Administrative Procedure Act, Iowa Code section 17A.19(10) (2007), governs our review of agency action. *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 498 (Iowa 2003). Our review of an agency finding is at law and not de novo. *Id*. If the claim of error lies with the agency's findings of fact, the proper question on review is whether substantial evidence supports those findings of fact. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). Evidence is substantial when a reasonable person could accept it as adequate to reach the same finding. *Asmus v. Waterloo Cmty. Sch. Dist.*, 722 N.W.2d 653, 657 (Iowa 2006). "The possibility of drawing two inconsistent conclusions from the same evidence does not prevent the agency's decision from being supported by substantial evidence." *Robbennolt v. Snap-On Tools Corp*., 555 N.W.2d 229, 233 (Iowa 1996). Where the evidence is in conflict or where reasonable minds might disagree about the conclusion to be drawn from the evidence, the court must give appropriate deference to the agency's findings. *Freeland v. Employment Appeal Bd.*, 492 N.W.2d 193, 197 (Iowa 1992). The agency, not the court, weighs the evidence; we are obliged to broadly and liberally apply those

findings to uphold rather than defeat the agency's decision. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 632 (Iowa 2000). On review, the question is not whether the evidence supports a different finding, but whether the evidence supports the findings the agency actually made. *Id*. In other words, the agency's findings are binding on appeal unless a contrary result is compelled as a matter of law. *Id*.

***III. Discussion*.**

On appeal, M.S. contends the agency's final decision was not supported by substantial evidence as required by law. He argues the therapists' hearsay statements of L.S. and the Department's one-sided investigation did not provide substantial evidence that the alleged abuse occurred. He further argues he provided substantial evidence that the allegations were unfounded.

At the hearing, the Department conceded there was no physical evidence to support the allegation of sexual contact. The Department's case was based primarily upon hearsay evidence. Hearsay is admissible in administrative proceedings. *Gaskey v. Iowa Dep't. of Transp*., 537 N.W.2d 695, 698 (Iowa 1995). The Department presented no corroborative evidence, not atypical in this kind of matter.

L.S.'s two videotaped interviews with the forensic interviewer were introduced into evidence. L.S. did not testify before the A.L.J., nor did the interviewer. In addition to the videotapes, L.S.'s therapists testified by telephone, and the Department's child protection worker testified in person. The therapists attested to L.S.'s credibility, but both testified that their roles were to take L.S.'s statements at face value and therefore, they made no investigation of L.S.'s

claims. The A.L.J., the original fact-finder, found that "[t]he uncritical acceptance of L.S.'s statements by one and all as being true without attempting to verify very much about what she said detracted from the weight that could be accorded to such evidence." While we may agree with this statement, this review is from the "final agency action." *See* Iowa Code § 17A.19(1). As noted by the district court, it is incumbent upon the reviewing court to determine whether the final decision is supported by substantial evidence, and not a comparison of the proposed and final decisions. *See Meyers v. F.C.A. Servs., Inc.*, 592 N.W.2d 354, 358 (Iowa 1999) (holding that the deputy commissioner's findings are not a consideration on judicial review and the court should not review the final agency action in light of why the commissioner disagreed with the deputy commissioner's disability rating). Thus, the issue on our judicial review is whether the deputy director's final decision is supported by substantial evidence.

In this regard, our role on review of the agency's action is governed by Iowa Code section 17A.19(10). "Substantial evidence" is defined as evidence of "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1). This provision "is a strengthening and clarifying elaboration of the substantial evidence test of original [Iowa Administrative Procedure Act] section 17A.19(8)(f) . . . ." Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act*, *Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 64 (1998) The elaboration was added to clarify that:

> the sufficiency of the evidence must be judged against the reasonable person standard in a context where "the consequences resulting from the establishment of that fact are understood to be serious and a great importance" because, of course, a greater quality and quantum of evidence would be required in those circumstances by a reasonable person than in circumstances where the consequences of the fact finding are considered wholly insignificant.

Id. In the drafter's view, the provision was modified because "in a few cases the courts seem to have simply rubber stamped a contested agency finding of fact without giving it scrutiny of the kind contemplated by the substantial evidence test." *Id*. Nevertheless, this standard does not allow a court on judicial review to re-weigh the evidence. *See Arndt v. City of LeClaire*, 728 N.W.2d 389, 394 (Iowa 2007).

This "he said/she said" matter is both troubling and difficult for this court. There are only two persons on this earth who know the truth: M.S. and L.S. As is characteristic of this kind of case, there are no other witnesses, and there is no corroborating evidence. Administrative procedures do not afford an accused the same Due Process protections provided to one accused of a crime, but the consequences are no less serious. The Department's findings are based largely on hearsay and attestations of credibility.

The shackles that confine our judicial review of this administrative action prohibit us from re-weighing the evidence. We are obliged to broadly and liberally apply the agency's findings to uphold rather than defeat the agency's action. Acutely mindful of these constraints, we cannot say as a matter of law that the deputy director's final decision is not supported by substantial evidence.

We must therefore affirm the agency's final decision and deny expungement of the child abuse report.

***IV. Conclusion*.**

Because we conclude substantial evidence supports the agency's final decision affirming the Department's finding of child abuse and placing the finding on the Central Abuse Registry, we affirm.

AFFIRMED.