IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RAUDEL M. RUIZ,
Appellant,
vs.
SEARS HOLDING CORP.; AND
SEDGWICK CMS,
Respondents.

No. 75035-COA

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Appellant Raudel M. Ruiz qualified for rehabilitation benefits after sustaining an industrial injury while working for respondent Sears Holding Corporation. *See* NRS 616C.530(5). Respondent Sedgwick CMS, the workers' compensation insurer, offered Ruiz a nine-month vocational rehabilitation program in order to return him to work as an administrative assistant. After Ruiz's attorney expressed concern regarding the program's viability, Sedgwick terminated Ruiz's vocational rehabilitation benefits. An appeals officer affirmed Sedgwick's determination, and the district court denied Ruiz's petition for judicial review. The Nevada Supreme Court reversed and remanded the matter due to the appeals officer's lack of findings. *See Ruiz v. Sedgwick CMS*, Docket No. 61425 (Order of Reversal and Remand, April 25, 2014).

On remand, the appeals officer determined that an independent medical evaluation was necessary to comply with the Nevada Supreme Court's order. Accordingly, Dr. Wm. Richard Hayes, Jr. performed the independent medical evaluation. Despite opining that any attempts at

retaining Ruiz for a higher-skilled occupation were doubtful due to his limited educational background, Dr. Hayes answered in the affirmative, without any further explanation, to two questions that asked if the vocational rehabilitation program was appropriate and viable. In answering the third question as to whether Dr. Hayes believed Ruiz would have received sufficient training to enable him to find gainful employment at the conclusion of the vocational rehabilitation program, Dr. Hayes answered:

> It is my understanding that Mr. Ruiz failed his vocational rehabilitation training in 2010. As that training was, in effect, concluded in 2010, I would answer that he is unable to find gainful employment with his permanent physical restrictions.
>
> In full summary, I consider this gentleman's injuries to be fully related to the industrial injury described. I think he is unemployable in any fashion as outlined in detail above based upon both the physical limitations of his amputation with the ongoing pain and his lack of education allowing a more skilled position.

Subsequently, Edward Ochoa, a rehabilitation specialist and consultant, conducted a vocational assessment, at Sedgwick's request. Ochoa stated that "there is ample basis to question the [vocational rehabilitation services] efforts undertaken as, in fact, being viable." Ochoa continued to note that the nine-month vocational rehabilitation program required that an eighteen-month eligibility period be maintained, and that the specific vocational preparation period for an administrative assistant position required two to four years. Moreover, Ochoa concluded that "a person's math, reasoning and language abilities and educational background for an Administrative Assistant are significant and appear to

be beyond those maintained by the injured employee even if a GED was attained." Additional reasons, including Ruiz's physical condition, gave Ochoa concern regarding the planned vocational rehabilitation program.

Finally, Dr. Andrew Wesely, Ruiz's treating physician, provided an affidavit to the appeals officer. Dr. Wesely confirmed that Ruiz was restricted to "only attend classes for 4 hours at a time" due to his physical condition. Dr. Wesely also averred that he "never reviewed or had any knowledge of the 'nine month' formal training program issue, mentioned in the Supreme Court's Decision, which was created two months after I signed permission to have the training program created."

The appeals officer affirmed Sedgwick's determination terminating Ruiz's vocational rehabilitation benefits. The appeals officer relied on Dr. Hayes' answers to the three questions posed in his evaluation to find that the vocational rehabilitation program was appropriate, compatible with Ruiz's physical condition, and sufficient for Ruiz to obtain enough formal training or education to return him to work.

The district court denied Ruiz's petition for judicial review. Ruiz now appeals, and the parties dispute whether the appeals officer's decision and order is supported by substantial evidence. We agree with Ruiz and conclude that the appeals officer's decision and order is not supported by substantial evidence.[1]

In reviewing an administrative agency's decision, the reviewing court does not give deference to a district court's order denying a petition for judicial review. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). Additionally, we review the administrative agency's

[1]Because we agree with Ruiz on this basis, we need not address his other argument.

factual findings for clear error or an abuse of discretion, only overturning findings not supported by substantial evidence. NRS 233B.135(3)(e). "Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion." *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 624, 310 P.3d 560, 564 (2013) (internal quotation marks omitted). Substantial evidence may also be shown inferentially if certain evidence is absent. *Wright v. State, Dep't of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005).

Moreover, "[i]f the [administrative] agency's decision lacks substantial evidentiary support, the decision is unsustainable as being arbitrary or capricious." *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 899, 59 P.3d 1212, 1219 (2002). And, "[a]lthough this court will not substitute its judgment for that of the agency as to the weight of the evidence, this court will reverse an agency decision that is clearly erroneous in light of reliable, probative, and substantial evidence on the whole record." *Constr. Indus. Workers' Comp. Grp. v. Chalue*, 119 Nev. 348, 352, 74 P.3d 595, 597 (2003).

Review of the whole record reveals that the appeals officer's decision and order is not supported by substantial evidence.[2] A reasonable

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[2]While the dissent correctly acknowledges that this court does "not substitute [our] judgment for that of the agency as to the weight of evidence," the dissent incorrectly relies strictly on Dr. Hayes' medical analysis and the appeals officer's factual conclusions without taking into account the entire record. It is upon review of the entire record that we reverse, as there is no stated reason why Dr. Hayes and the appeals officer discounted the contrary evidence. Moreover, while the Nevada Supreme Court previously instructed the appeals officer to make certain findings concerning the viability of the vocational rehabilitation program, the appeals officer must have still supported his or her findings with substantial evidence.

mind would not accept Dr. Hayes' responses to the three questions as adequate to support the appeals officer's conclusion that Ruiz refused to participate in a suitable vocational rehabilitation program offered to him in light of the entire record. Dr. Hayes' independent medical evaluation did not take into account the evidence Ruiz submitted to the appeals officer. Specifically, it did not consider Dr. Wesely's affidavit regarding the four-hour physical restriction Ruiz's own medical provider placed upon Ruiz's participation in classes, which was based upon Ruiz's physical condition as an amputee, and no other evidence showed that six and a half hours of training every weekday would be compatible with that condition. *See* NRS 616C.555(1). Indeed, review of Dr. Hayes' entire independent medical evaluation conflicts with his one-word answers. Moreover, there not only is a lack of sufficient evidence showing that the physical demands of the vocational rehabilitation program was compatible with Ruiz's physical condition during the time he was to complete the program, there is a lack of sufficient evidence showing that Ruiz was capable of obtaining the necessary skills for an administrative assistant position. Rather, ample evidence, as set forth in both Dr. Hayes' evaluation and Ochoa's assessment, showed that it was not viable for Ruiz to obtain enough formal training or education during the nine-month program to return him to work. *See* NRS 616C.530(5). Such a vocational rehabilitation program undermines the purpose of the Nevada Industrial Insurance Act. *See Tarango v. State Indus. Ins. Sys.*, 117 Nev. 444, 453, 25 P.3d 175, 181 (2001) (recognizing that "[v]ocational rehabilitation was designed to provide methods to promptly return the employee to the workforce"). Therefore, in light of the whole record, Ruiz did not reject a *suitable* program, *see* NAC 616C.601(a),

and thus, the appeals officer erred in affirming Sedgwick's determination to terminate Ruiz's vocational rehabilitation benefits.

Accordingly, we reverse the district court's order denying judicial review and remand this matter to the district court with instructions to reverse the appeals officer's decision and order.

It is so ORDERED.

_____, A.C.J.
Douglas

_____, J.
Gibbons

TAO, J., dissenting:

I respectfully dissent and would simply affirm. Ruiz's benefits were terminated not because of his absence from work per se, but rather because he refused to participate in a vocational rehabilitation program designed to get him in shape to go back to work. On remand from the Nevada Supreme Court, the appeals officer appointed an Independent Medical Examiner (Dr. Hayes) who studied the case and reported, in written answers, that the vocational rehabilitation program offered to Ruiz was appropriate and viable. Citing this, the appeals officer affirmed the denial of benefits.

I would conclude that a decision that relies upon the written responses of an Independent Medical Examiner who (unlike other physicians) was not retained or paid by either party is, virtually by definition, one supported by "substantial evidence" as defined in NRS

Chapter 233B that requires affirmance on appeal. We do "not substitute [our] judgment for that of the agency as to the weight of evidence." *Constr. Indus. Workers' Comp. Grp. v. Chalue*, 119 Nev. 348, 352, 74 P.3d 595, 597 (2003). Here, the record certainly includes contrary evidence that the appeals officer could have relied upon to reach a different conclusion than he did. Moreover, as my colleagues also note, portions of Dr. Hayes' report seem to ignore certain pieces of evidence cited by other witnesses, and furthermore appear potentially inconsistent with his ultimate medical conclusion, but who knows; unlike Dr. Hayes, I am not a trained physician. I would think that if anyone knows what evidence is medically important or unimportant to, or scientifically consistent or inconsistent with, his final conclusion, it ought to be Dr. Hayes. Consequently, I would defer to, rather than second-guess, both the medical analysis performed by Dr. Hayes as well as the factual conclusions reached by the appeals officer who reviewed Dr. Hayes' report, and affirm.

Tao, J.

Tao

cc: Hon. Barry L. Breslow, District Judge
Diaz & Galt, LLC/Reno
Hutchison & Steffen, LLC/Reno
Washoe District Court Clerk