

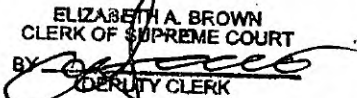
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENNETH OLSON,
Appellant,
vs.
TRAVELERS,
Respondent.

No. 83330-COA

FILED

AUG 29 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Kenneth Olson appeals from a district court order denying a petition for judicial review of an administrative proceeding denying workers' compensation benefits. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Olson worked for Anderson Dairy as a refrigeration engineer.¹ As part of his job, Olson maintained boilers, which involved handling various chemicals. According to Olson, he used an air hose to blow concrete dust off two of the dairy's boilers that had gathered as a result of construction work on the premises. In the process, Olson claims to have scraped dried chemicals off the boilers, which he then blew off along with the concrete dust. The next day, Olson was outside and noticed that he could no longer see the red light on top of a cell phone tower with his left eye. He first sought medical treatment for an acute onset of his vision loss a couple of days after that. Over the course of the next few months, he experienced progressively worsening symptoms, and he sought further treatment from multiple doctors. Treatment was unsuccessful, and Olson eventually went blind in both eyes.

¹We do not recount the facts except as necessary to our disposition.

During his treatment, Olson sought workers' compensation benefits, and Anderson Dairy's industrial insurance carrier, Travelers, denied his claim. A Department of Administration hearing officer affirmed the insurer's denial of benefits, and Olson requested a hearing before an appeals officer. Prior to this hearing, the appeals officer granted Olson's motion to preclude evidence of an Occupational Safety and Health Administration (OSHA) report. Additionally, counsel for Anderson Dairy and Travelers sent Olson's medical records to Kenneth W. Houchin, M.D., a neuro-ophthalmologist, who reviewed the records and concluded that Olson's past medical history was "significant for hypertension, diabetes mellitus, hyperlipidemia, and smoking, which are the main four risk factors for ischemic optic neuropathy," and "the most likely cause of the bilateral optic neuropathy is nonarteritic ischemic optic neuropathy as diagnosed by [one of Olson's other physicians]." He went on to conclude with medical certainty that the cause of Olson's optic neuropathy was not exposure to a toxic agent but rather was either nonarteritic anterior ischemic optic neuropathy or optic neuritis.

After the hearing, the appeals officer affirmed the hearing officer's decision and the appeals officer's order, in part, concluded that "the opinion of the IME physician Dr. Houchin [is] credible and persuasive in this matter in that his findings comport with the medical evidence." Olson petitioned the district court for judicial review of the appeals officer's decision, and the district court denied Olson's petition.

Olson then appealed from the district court's order denying his petition for judicial review. In 2018, this court issued an order of reversal and remand, finding that the appeals officer's conclusion of law that Dr. Houchin was an IME physician was clearly erroneous and was not harmless

because the record reflected that the appeals officer gave more weight to Dr. Houchin's opinion.

On remand, the appeals officer ordered an IME and selected neuro-ophthalmologist Sharon Johnstone, M.D., to perform the IME. The appeals officer ordered Travelers to arrange for the IME to be conducted by Dr. Johnstone and that Travelers was to be responsible for all of the expenses relating to the exam as well as providing Dr. Johnstone with the appropriate documents, which was limited to the evidence admitted in the proceedings. Although apparently unhappy with the selected IME physician, Olson traveled to Arizona for his scheduled IME and audio recorded the examination without Dr. Johnstone's permission.

In an addendum to her IME report, Dr. Johnstone referenced an OSHA report that the appeals officer had previously excluded from evidence. She noted that the OSHA investigation revealed no leakage site for any of the chemicals postulated to have been exposure agents. At the hearing, Dr. Johnstone also testified that she had considered the chemicals present at Olson's workplace, as indicated by Olson during the examination and in the medical records of another physician. Dr. Johnstone further testified that she undertook a search of the National Medical Database and "looked for every possible cause of vision loss." In her addendum, Dr. Johnstone documented that Olson's historical account of the events changed over time, that Olson did not consistently report or deny having diabetes despite medical evidence suggesting otherwise, that Olson misrepresented his blood pressure and medication use, and that Olson's clinic notes demonstrated poor stewardship of his health. Ultimately, Dr. Johnstone diagnosed Olson with idiopathic optic neuropathy, with aggravating factors, unrelated to any alleged toxic exposure at the workplace.

At the hearing before the appeals officer, there was discussion about which party had provided Dr. Johnstone with the previously excluded OSHA report. Dr. Johnstone testified that she was unsure who provided her with the report but that it must have been Travelers because she had “never received information from a patient”² and that if she is hired to be an IME physician, she “pretty much rel[ies] on the facts of the case that are provided by whomever [] request[ed] [the evaluation].” Nevertheless, Dr. Johnstone testified that the OSHA report “[had] no bearing” on her conclusion regarding Olson’s condition. Finally, in response to a question posed by counsel at the hearing, Dr. Johnstone agreed that “to [a] reasonable degree of medical probability [Olson’s] condition was not work related.”³ Following the hearing, the appeals officer permitted the parties to submit written closing arguments, neither of which is included in the record before us.

The appeals officer affirmed the hearing officer’s decision. The appeals officer found that Dr. Johnstone credibly testified that she was unsure who provided her with the OSHA report but that it would have made no difference in her conclusions. The appeals officer also concluded that Dr. Johnstone’s opinion that Olson’s vision loss was probably not due to toxic

²We note that while Dr. Johnstone did apparently receive medical records from Olson, arguably in violation of the appeals officer’s interim IME order, she testified that these medical records were duplicative of the records she had already received from Travelers.

³Dr. Johnstone’s testimony at the hearing is consistent with the addendum to her IME report where she concluded: “The degree of medical probability that Mr. Olson’s condition was NOT a consequence of his workplace is almost certain. In recommended parlance, greater than 50% probability that the cause of his vision loss was not a toxic exposure in the workplace.”

exposure in the workplace was consistent with other credible expert opinions, including that of Dr. Houchin's. Olson then petitioned the district court for judicial review of the appeals officer's decision. The district court denied the petition and affirmed the appeals officer's decision.

On appeal, Olson argues that substantial evidence did not support the appeals officer's decision but instead supports his claim for workers' compensation benefits, and that this case lends itself to a mixed-risk assessment.⁴ Even assuming the facts support a mixed-risk, Olson failed to argue this below and therefore we decline to consider this issue on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal").

Thus, we next determine whether substantial evidence supported the appeals officer's decision to deny Olson benefits because his risk of injury was of a personal nature. In doing so, we address the three arguments presented by Olson. Olson argues that substantial evidence does not support the appeals officer's decision because the appeals officer's reliance on Dr. Houchin's opinion was clear error, Dr. Johnstone's use of the

⁴Olson also argues on appeal that Dr. Johnstone's IME was unreliable because she testified that Olson's secret recording of the IME appointment violated her professionalism and judgment and that the appeals officer's interim order was highly prejudicial. We decline to address these arguments because Olson raised them for the first time in his reply brief. *See, e.g.*, NRAP 28(c) (providing that a reply brief "must be limited to answering any new matter set forth in the opposing brief"); *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that those issues not raised in an opening brief are deemed waived). Nevertheless, we do not find Olson's arguments persuasive.

excluded OSHA report rendered her IME unreliable, and Dr. Johnstone was not truly independent.

“On appeal, the standard for reviewing petitions for judicial review of administrative decisions is the same for this court as it is for the district court.” *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013) (internal quotation marks and alterations omitted). This court “review[s] an administrative agency’s factual findings for clear error or an arbitrary abuse of discretion,” and it will not overturn those findings if they are supported by substantial evidence. *Id.* (internal quotation marks omitted). “Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency’s conclusion” and “[t]his court will not reweigh the evidence or revisit an appeals officer’s credibility determination.” *Id.* (internal quotation marks omitted).

First, Olson argues that the appeals officer’s reliance on Dr. Houchin’s opinion was clear error because this court previously found that the classification of Dr. Houchin as an IME physician was clearly erroneous. While it is correct that this court previously reversed and remanded this case because the appeals officer’s conclusion of law that Dr. Houchin had performed an IME was clearly erroneous, that same error is not present here. The record is clear that, on remand, the appeals officer considered Dr. Houchin’s opinion as that of a medical expert, not as an IME physician. Further, to the extent Olson argues the appeals officer’s assignment of weight to the various expert opinions, including that of Dr. Houchin’s, was in error, this court will not revisit the appeals officer’s credibility determinations. *Id.* Accordingly, Olson’s argument that the appeals officer improperly relied on Dr. Houchin’s medical opinion in reaching his decision is unpersuasive.

Second, Olson takes issue with Dr. Johnstone's use of the excluded OSHA report and appears to argue that, because Dr. Johnstone relied on the OSHA report at least twice, it is impossible to know how much of a role the report played when Dr. Johnstone was forming her medical opinion and, therefore, Dr. Johnstone's IME is unreliable. Although it is regrettable that the OSHA report was provided to Dr. Johnstone, the record suggests that this circumstance did not change the result below, and the appeals officer found that Dr. Johnstone credibly testified that the report did not make a difference in her conclusions. This court will not revisit the appeals officer's credibility determinations. *Id.* Thus, there is no reversible error. See *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) ("To establish that an error is prejudicial, the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached.").

Third, Olson argues that Dr. Johnstone's IME was not truly independent because Dr. Johnstone testified that when she is hired to be an IME physician, she relies on the facts of the case that are provided by whomever is requesting the IME. Olson asserts that this statement shows that Dr. Johnstone's medical reporting was unfairly biased towards Travelers. Olson's argument is not well-founded as it fails to recognize that it was the appeals officer who appointed Dr. Johnstone to perform the IME and directed Travelers to coordinate the examination including providing the appropriate documents. To the extent that Olson raised this issue in his written closing argument, we need not address it because Olson failed to provide this court with the parties' written closing arguments, and we presume that any missing documents support the appeals officer's decision. NRAP 30(b)(3); *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603,

172 P.3d 131, 135 (2007) (holding that appellant is responsible for making an adequate record on appeal and when “appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court’s decision”).⁵ Regardless, the record does not support the conclusion that Dr. Johnstone was biased in favor of Travelers merely because Travelers provided information to her as directed by the appeals officer, particularly since Olson also took the opportunity to provide records to Dr. Johnstone. Further, Dr. Johnstone researched every possible cause of vision loss, including possible toxic exposure, in an effort to be thorough, which also supports the independent nature of her examination.

Based on the foregoing, we conclude that substantial evidence exists in the record supporting the appeals officer’s conclusion that Olson’s injury, within a reasonable degree of medical probability, was due to his own personal risks and not work-related. Therefore, we need not address Olson’s argument that substantial evidence supports his claim for workers’

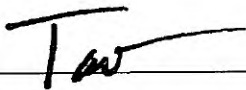
⁵Olson also argues that this case is ripe for a mixed-risk assessment because Travelers, the appeals officer, and Dr. Johnstone all heavily relied upon his medical records. Olson asks that if we give deference to the appeals officer’s findings of fact, that we also consider the likelihood that his health issues caused vision impairment during the time that he was exposed to toxic dust chemicals. It does not appear, however, that Olson offered medical testimony below to support that this was a mixed risk which should have been considered by the appeals officer. Instead, substantial medical evidence supports that this was a personal risk related to Olson’s underlying medical conditions to preclude coverage.

compensation benefits because we only determine if substantial evidence supports the decision actually made.⁶

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Ronald J. Israel, District Judge
Ara H. Shirinian, Settlement Judge
Greenman Goldberg Raby & Martinez
Law Offices of David Benavidez
Eighth District Court Clerk

⁶Insofar as the parties have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.