

No. 1-13-2415

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SAMUEL KENDRICK, JR.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	No. 12 CH 43995
ILLINOIS DEPARTMENT OF CHILDREN AND)	
FAMILY SERVICES and RICHARD H. CALICA,)	
DIRECTOR,)	Honorable
)	Neil H. Cohen,
Defendants-Appellees.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* The administrative decision of the Illinois Department of Children and Family Services denying plaintiff's request to expunge an indicated report of child abuse was affirmed where it was neither against the manifest weight of the evidence nor clearly erroneous.
- ¶ 2 Plaintiff, Samuel Kendrick, Jr., appeals an order of the circuit court affirming a decision of defendant Richard H. Calica (Director), the Director of defendant Illinois Department of

Children and Family Services (Department), denying plaintiff's request to expunge from the State central register¹ an indicated finding of child abuse entered against plaintiff for striking and injuring his son, S.K. On appeal, plaintiff asserts that the indicated report should have been expunged because the Department failed to prove by a preponderance of the evidence that the specific injury to S.K. (ruptured eardrum) alleged by the Department was caused when plaintiff slapped S.K. Alternatively, plaintiff argues that even if his action caused the injury, it did not constitute abuse. We affirm.

¶ 3 On April 4, 2012, plaintiff and his wife, Onna Ford-Kendrick (Onna), resided in Chicago with their 13-year old son S.K., 4-year-old son E.K., and Onna's 17-year-old daughter J.K. Plaintiff and Onna had been married 14 years and were engaged in acrimonious divorce proceedings which included a child custody dispute. On that date, plaintiff allegedly struck S.K. as corporal punishment when S.K. failed to respond to plaintiff's directive to clean up the mess of a toilet that had overflowed. On the following day, the Department received a hotline report of possible child abuse or neglect by plaintiff. The Department conducted an investigation and, on June 25, 2012, notified plaintiff by letter that he had been found to have abused or neglected a child and had been indicated for allegation of harm. DCFS based its finding on its Allegation #11 titled "Cuts, Bruises, Welts, Abrasions and Oral Injuries."² Plaintiff requested an appeal of the Department's decision indicating abuse, and an administrative hearing on his expungement

¹Central register of all cases of suspected child abuse or neglect reported and maintained by the Illinois Department of Children and Family Services under the Abused and Neglected Child Reporting Act. 325 ILCS 5/7.7 (West 2012).

²89 Ill Admin. Code 300.Appendix B, amended at 36 Ill. Reg. 4026 (eff. Mar. 5, 2012).

request was held before an administrative law judge (ALJ) on October 5, 2012. The following testimony was presented at the hearing.

¶ 4 Onna Ford-Kendrick, S.K.'s mother, was a registered nurse for 20 years. Around dinnertime midway in the first week of April 2012, she was in the kitchen of her home with her husband (plaintiff) and their three children. S.K. had caused the toilet in the first-floor bathroom to be stopped up with feces and toilet paper, and the toilet overflowed when E.K. flushed it. Plaintiff was "very upset about it." He verbally reprimanded S.K., and he directed S.K. to clean up the mess. When S.K. did not move fast enough, plaintiff became very agitated and cursed a lot. He told S.K., "What the f*** is wrong with you?" Onna had never seen him so upset. Onna told plaintiff to go outside and cool off. Plaintiff told S.K. he was not moving fast enough. With his open left hand, plaintiff struck S.K. on the right side of his face. Then plaintiff struck him a second time in the same place. Plaintiff's hand extended from S.K.'s chin to above his ear. Onna did not see the first slap; she only heard it. She saw the second slap and saw S.K. fall to the floor. S.K. was screaming, "My ear, my ear." Onna told plaintiff to get out of the house. She picked S.K. up from the floor and looked inside his ear but could see nothing. Some 30 or 40 minutes later, S.K. went upstairs and took a shower, and he cried when the water hit his eardrum. Onna suspected that her son's eardrum may have been ruptured. She told plaintiff to take S.K. to the hospital. Plaintiff told Onna to take the boy to the hospital, but she did not want to do so because she did not want hospital personnel to think she had injured him. That evening plaintiff took S.K. to the emergency room at Ingalls Memorial Hospital in Flossmoor.

¶ 5 Several days later, Onna took S.K. to Dr. Dixon at Family Christian Health Center. There was too much blood for Dr. Dixon to see anything in the ear and she recommended another

follow-up examination with Dr. Othman, an ear-nose-throat (ENT) specialist. Onna admitted that, although being a nurse she is a mandated reporter, she did not report the incident to DCFS until about April 26. She went to the police a week after the slapping incident, but the police would not take a report because plaintiff was a police officer.

¶ 6 Eleanor Powell was employed as a child protective investigator (CPI) by the Department's Child Protection Division. She was assigned a hotline call that came into the Department on April 5, 2012, for Allegation #11: cuts, bruises, welts, abrasions, and oral injuries. On that same day, Powell and her intern, Maddy Goodreau, interviewed plaintiff and members of his family in their home. Powell saw a bruise on the right side of S.K.'s face and photographed it. S.K. said that was the first time he had been slapped in the face. Powell interviewed Onna, who said she had seen blood coming out of S.K.'s ear, but Powell saw no blood. Powell also interviewed the younger son, E.K., who said there was no hitting going on in the home. Subsequently, Powell interviewed plaintiff. She testified plaintiff admitted to her that he had slapped S.K. who slipped to the floor, and that as a result plaintiff had caused his son's injury. However, his admission that he caused the injury was not contained in Powell's report. At the conclusion of her investigation, resulting from what S.K. and the doctor had said, Powell indicated abuse based on S.K. having a perforated eardrum caused by being hit by his father.

¶ 7 Plaintiff testified that he was a Chicago police officer and had arrived home from work at about 4:30 p.m. on April 4, 2012. He went into the downstairs bathroom and observed a large amount of feces and toilet paper in the toilet. He learned that S.K. had left the toilet in that condition, and he had "sternly admonished" S.K. previously about the same problem. A short time later, E.K. flushed the toilet, which overflowed onto the floor. Plaintiff went into the kitchen

where S.K. was sitting at the table and asked S.K. to help him clean up the mess. S.K. was "very slow to move." He went downstairs to the basement to change his clothes and was downstairs for a long period of time. Plaintiff yelled down to S.K., "Hurry up and get up here." Plaintiff did not use curse words. "I was calm, I was stern, and I was a father trying to get his son to come upstairs and get the mess that he had left there." He was not enraged, screaming, or out of control. S.K. came upstairs but did not go toward the bathroom. Plaintiff asked S.K. at least five times to assist him. Plaintiff testified: "I then intended to deliver corporal punishment and slap him on his shoulder to stun him and get his attention so that he would come into the bathroom." When plaintiff attempted to do so, he "accidentally struck him in the ear." As a normal course, both plaintiff and his wife use corporal punishment. "It's part of our religious beliefs. It's part of our family belief as well." Plaintiff did not see blood coming out of S.K.'s ear or see any marks or bruises on him that day. S.K. did not fall to the floor. He "grabbed the side of his face and looked at me, and then he actually laid down to the floor."

¶ 8 Onna was upstairs at that time. She came downstairs and told S.K. to clean up the mess in the bathroom, and he did so. By that time S.K. was "sniffling." Onna directed S.K. to take a shower. As he was showering, he started yelling. Plaintiff asked S.K. if he was okay, and he said his ear was hurting. Plaintiff went to his bible study class that evening and arrived back home at 9:45. He asked S.K. if he needed to get his ear checked out and S.K. replied, "It would be nice." He said he had some discomfort in his ear. Plaintiff took S.K. to Ingalls Memorial Hospital, where he was prescribed an antibiotic but no pain medication. In the 13 years prior to that date, S.K. had had ear infections, but plaintiff could not recall when they had occurred.

¶ 9 On April 26, 2012, plaintiff was arrested on two counts of domestic battery, one against S.K. for the April 4 incident, and one against Onna for an incident on April 22, at which time plaintiff had an order of protection against Onna. *Nolle prosequi* orders were entered on both domestic battery allegations.

¶ 10 Dr. Shelley Dixon of the Family Christian Health Center testified by telephone that she is a Board-certified pediatrician. At some time in April 2012, S.K. was brought to Dixon at the Center for a follow-up visit for a ruptured tympanic membrane of the right ear canal. Her examination of the ear canal showed it was swollen in the tympanus, and she could not see the membrane very well. Dixon asked S.K. what happened, and he told her he was hit in the head by his father. Dixon made a referral that S.K. be seen by an ENT specialist.

¶ 11 The ALJ received in evidence the Department's 103-page investigation report. She also received in evidence exhibits from plaintiff: the medical records included within the Department's report; plaintiff's order of protection against Onna issued on April 23, 2012; and a certified copy of a court order of July 24, 2012, dismissing the two domestic battery charges against plaintiff. The medical records from Ingalls Memorial Hospital showed that on April 4, 2012, at about 11 p.m., S.K. was seen and examined by hospital personnel; he was complaining of aching pain in his right ear that began at about 4 p.m. that day. The medical record reported: "pt. stated he was hit in the car [*sic*] by a ball by the brother." S.K. reported pain at a level of 6 on a 0-to-10 scale; Ibuprofen (400 mg.) was administered and the pain level fell from 6 to 3. The final diagnosis given was "traumatic rupture tympanic membrane." An antibiotic was prescribed, referrals were made to a pediatrician (Dr. Wright) and an ENT (Dr. Othman), and Tylenol or Motrin was suggested for pain relief. The past medical history indicated pulmonary disease and

asthma but no ear infection. The hospital treating physician, Dr. H. Govindarajan, did not respond to the Department's subpoena to appear at the hearing.

¶ 12 Following the administrative hearing, the ALJ issued a Recommendation and Opinion. She recommended that the indicated finding as to Allegation #11 was not supported by the preponderance of the evidence and should be expunged. She found that no medical evidence was presented that plaintiff caused the rupture to S.K.'s tympanic membrane, and she observed that such ruptures could have many causes, including ear infections, very loud noises, rapid change in air pressure, injury from a slap or explosion, and insertion of cotton swabs and other small objects in the ear. She reasoned that because Onna found no injury to S.K.'s ear after examining the ear on April 4 and did not take him to the hospital that night, plaintiff's actions did not cause the injury. The ALJ also noted a lack of a past history of violence or uncontrolled behavior on the part of plaintiff. She found that plaintiff's testimony was credible and Onna's testimony was not credible. She concluded the ruptured tympanic membrane was "more consistent with the most common cause of childhood ear drum rupture, an ear infection," not by abusive action by plaintiff.

¶ 13 The Director rejected the ALJ's recommendation and denied plaintiff's request for expungement of Allegation #11. The Director did not accept the ALJ's determination that plaintiff was calm and not enraged or out of control, but instead reached the conclusion that plaintiff "was obviously angry enough to be pushed to a limit in which he struck his son rather than disciplining him another way." The Director concluded: "This incident appears to be one that spiraled out of control and one in which [plaintiff] who was described as a person who had no past history of violence, hurt his son by his use of force. Consequently, I find that he [*sic*] slap

which was at the site of the injury and so close in time to the ruptured eardrum was caused by [plaintiff]."

¶ 14 Plaintiff appealed to the circuit court, which affirmed the Director's decision. He now appeals to this court, contending that the Director's finding, that plaintiff's action caused the injury to S.K., was against the manifest weight of the evidence and clearly erroneous.

¶ 15 The Department investigates all reports of suspected child abuse or neglect and classifies them as "indicated," "unfounded," or "undetermined." 325 ILCS 5/7.12 (West 2012); *Slater v. Department of Children and Family Services*, 2011 IL App (1st) 102914, ¶ 23. A report is "indicated" when an investigation determines that credible evidence of the alleged abuse or neglect exists. 325 ILCS 5/3 (West 2012). Credible evidence of abuse or neglect is found when the available facts, viewed in light of surrounding circumstances, would cause a reasonable person to believe that a child was abused or neglected. 89 Ill. Adm. Code 300.20, amended at 35 Ill. Reg. 1599 (eff. Jan. 15, 2011). The subject of an indicated report may ask the Department to amend the record of the report or remove the record from the central register. If the Department refuses the request, the subject has the right to an administrative hearing before an ALJ to determine whether the record should be amended or removed. 325 ILCS 5/7.16 (West 2012); *Shilvock-Cinefro v. Department of Children and Family Services*, 2014 IL App (2d) 130042, ¶ 21. The Department must prove that a preponderance of the evidence supports the indicated finding. *Id.*, citing *Slater v. Department of Children and Family Services*, 2011 IL App (1st) 102914, ¶ 24. After the hearing, the Department's director receives the ALJ's recommendation and may accept, reject, amend, or return the recommendation. *Id.* The decision of the director is the final administrative decision. *Id.*

¶ 16 Judicial review of the director's decision is governed by the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2012)). 325 ILCS 5/7.16 (West 2012). In an appeal from an administrative review action, this court reviews the decision of the agency rather than that of the circuit court. *Julie Q. v. Department of Children and Family Services*, 2011 IL App (2d) 100643, ¶ 26, *aff'd*, 2013 IL 113783. The applicable standard of review depends on whether the question presented is one of fact, law, or a mixed question of fact and law. An agency's findings and conclusions on questions of fact are deemed *prima facie* true and correct. *Cinkus v. Village of Stickney Municipal Officers*, 228 Ill. 2d 200, 210 (2008). Consequently, a reviewing court will reverse its factual determinations only if they were contrary to the manifest weight of the evidence. *Illinois Council of Police v. Illinois Labor Relations Board*, 387 Ill. App. 3d 641, 657 (2008). An administrative agency's factual determinations are against the manifest weight of the evidence if the opposite conclusion is clearly evident. [Citations.]" *Cinkus*, 228 Ill. 2d at 210. Conclusions of law, however, are reviewed *de novo*. *Id.* If the question presented for review is one of mixed law and fact, a third standard applies--a standard of review of "clearly erroneous." *Id.* at 211, citing *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998). An administrative agency's decision is "clearly erroneous" when the reviewing court is left with the " 'definite and firm conviction that a mistake has been committed.' " *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001), quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

¶ 17 Here, plaintiff asserts this appeal presents a question of fact, *i.e.*, that the determination of the Department--that plaintiff perforated S.K.'s eardrum by slapping the boy-- was against the manifest weight of the evidence. Plaintiff also contends that even if his slapping of S.K. resulted

in the eardrum injury, his action did not constitute abuse; this is a mixed question of mixed law and fact to which we apply the "clearly erroneous" standard.

¶ 18 Plaintiff questions the Director's rejection of the ALJ's factual determination on the basis that the ALJ heard the testimony of witnesses first-hand and was in a better position to determine their credibility. He notes that the ALJ found that Onna, who was engaged in a battle with plaintiff for the custody of their children, was not a credible witness and that plaintiff was credible. However, even if Onna's testimony were dismissed, a substantial portion of the incriminating evidence indicating abuse was presented either as unchallenged medical evidence or as hearsay, placing the Director in substantially the same factfinding position as the ALJ.

¶ 19 Supporting the Director's conclusion that plaintiff's striking of S.K. caused his ear injury was the testimony of Investigator Powell, who stated plaintiff admitted to her he caused the injury when he struck S.K. on the side of the head. In addition, Dr. Shelley Dixon, who examined S.K. a few days after the incident, testified that she asked S.K. how the ear injury occurred and he replied that his father had hit him in the head.

¶ 20 Even if we were to ignore the testimony of Powell and Dr. Dixon and reject Onna's testimony as lacking credibility, as the ALJ apparently did, plaintiff's own testimony at the hearing established a nexus between his action and the injury. He admitted he "intended to deliver corporal punishment and slap [S.K.] on his shoulder to stun him and get his attention" but that he "accidentally struck him in the ear." Plaintiff denied S.K. fell to the floor, but stated the boy "laid down to the floor." Plaintiff admitted that, following the slapping incident, he demonstrated concern for the condition of S.K.'s ear. When S.K. took a shower after the incident and started yelling, plaintiff asked S.K. if he was okay, and S.K. replied his ear was hurting.

When plaintiff returned home later that evening, he asked S.K. if he needed to get his ear checked out. S.K. replied in the affirmative, and plaintiff took S.K. to the hospital. Patently, plaintiff's own testimony about his concern for his son's ear, and the close proximity in time between plaintiff's action in striking S.K. and the rupture of the eardrum, demonstrate a clear nexus between plaintiff's slapping of S.K. and the ruptured eardrum.

¶ 21 In his testimony at the administrative hearing, plaintiff downplayed any pain S.K. may have experienced from plaintiff's blow and testified that the hospital personnel prescribed no pain medication, only an antibiotic. He also testified he saw no bruise on S.K.'s face after the slapping incident. However, investigator Powell testified that she saw and photographed a bruise on the right side of S.K.'s face. The hospital records show that, although no painkiller was specifically prescribed, S.K. was in pain when he arrived at the hospital. On a scale of 10, his pain level was 6, but it was reduced to 3 after hospital personnel administered Ibuprofen. The treating physician recommended that S.K. take Tylenol or Motrin for pain relief.

¶ 22 Plaintiff argues that "there was no medical verification of the likely cause of the injury." On the contrary, the diagnosis of the hospital treating physician hours after plaintiff struck S.K. on the ear was "traumatic rupture tympanic membrane." Trauma has been defined as a "physical injury caused by a blow, or fall." See Black's Law Dictionary (6th ed. 1992). The treating doctor's description of the ruptured tympanic membrane as "traumatic" contradicted the ALJ's conclusion that the cause of the injury was a common ear infection.

¶ 23 In recognizing the merit to plaintiff's arguments regarding the ALJ being in a better position than the Director to judge the credibility of the witnesses, we are mindful of the standard of review. Accordingly, we conclude that the Director's factual determination that plaintiff caused S.K.'s ear injury was not against the manifest weight of the evidence and that the opposite conclusion reached by the ALJ was not clearly evident.

¶ 24 Plaintiff also argues that his action in striking S.K. did not constitute abuse. He contends S.K. did not have any medical conditions or any behavioral, mental or emotional problems, developmental disability, or physical handicap to indicate that striking S.K. would be considered abuse. He asserts this was a single incident with no previous history of indicated abuse and that there were no marks or abrasions on S.K. As noted above, however, investigator Powell noted bruising on the right side of S.K.'s face which she photographed. Plaintiff admitted this was not a single incident of corporal punishment; he testified that, as a normal course, both he and Onna used corporal punishment on their children as part of their religious beliefs. In this instance, by plaintiff's own admission, he administered corporal punishment not because S.K. was misbehaving or acting in an insolent manner, but merely because the boy was not moving quickly enough to please plaintiff. From this, the Director concluded that plaintiff "was obviously angry enough to be pushed to a limit in which he struck his son rather than disciplining him another way." The force of the blow was so strong that it ruptured the tympanic membrane in S.K.'s right ear and sent the boy to the floor, causing not only the serious injury but great pain. Both the hospital treating physician that evening, and the

followup physician days later, stressed that S.K. seek further treatment for the ear from an ENT specialist.

¶ 25 Plaintiff notes that the Director weighed conflicting evidence differently and made credibility assessments at odds with those reached by the ALJ. The ALJ rejected Onna's testimony that plaintiff was very upset, cursing, and agitated when he struck S.K., and accepted as credible plaintiff's testimony that he was calm and not out of control. However, an agency director is free to reject the credibility determinations made by a hearing officer. *Parikh v. Division of Professional Regulation of the Department of Financial and Professional Regulation*, 2012 IL App (1st) 121226, ¶ 32, citing *Starkey v. Civil Service Commission*, 97 Ill. 2d 91, 100-101 (1983). As a court of review, we have no basis under these facts to reject the Director's findings. Plaintiff's own testimony and the surrounding circumstances could cause a reasonable person to believe that plaintiff's action exceeded the bounds of reasonable or acceptable parental corporal punishment and that he had abused his son. Consequently, the Director's determination, that plaintiff's action constituted child abuse, was not clearly erroneous.

¶ 26 We conclude that the Director's ruling, denying plaintiff's request for expungement of an indicated report of child abuse against plaintiff, was neither against the manifest weight of the evidence nor clearly erroneous. Accordingly, we affirm the judgment of the circuit court upholding the decision of the Director.

¶ 27 Affirmed.