

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 0579

RICK SHEPPARD #108703

VERSUS

LOUISIANA DEPARTMENT OF PUBLIC
SAFETY AND CORRECTIONS

Judgment Rendered: DEC 07 2017

APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER C606267

HONORABLE JANICE CLARK, JUDGE

Rick Sheppard #108703
Louisiana State Penitentiary
Angola, Louisiana

Plaintiff/Appellee
Pro Se

Terri L. Cannon
Angola, Louisiana

Attorney for Defendant/Appellant
Louisiana Department of Public
Safety and Corrections

BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

McDONALD, J.

In this case, the Louisiana Department of Public Safety and Corrections (DPSC), appeals a judgment of the district court in favor of Rick Sheppard (an inmate in the custody of the DPSC) and against the DPSC, ordering that the DPSC obtain an appointment for Mr. Sheppard with an orthopedic specialist and that surgery be performed “as expeditiously as possible, on [Mr. Sheppard’s] pectoralis tear, but no later than [in] 15 days.” After a thorough review, we reverse and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Mr. Sheppard filed a petition for judicial review on October 25, 2011, asserting that he was injured on October 17, 2010, during the Angola Prison Rodeo.¹ He maintained that he was examined by a specialist in early 2011, that the specialist recommended surgery to reattach the major pectorial muscle, and ordered an MRI to determine whether there was damage to the rotary cuff. Mr. Sheppard maintained that it was recommended that he be treated by a chiropractor and given injections in the injured shoulder, but neither had been done.

Mr. Sheppard asserted that instead, he was seen by a second specialist who recommended exercises to allow the pectorial muscle to heal itself, but that the exercises had not worked. Mr. Sheppard maintained that he had been prescribed pain medication which had serious side effects, but that he had not received the necessary baseline or follow-up blood tests required to monitor the effects of his medication. Mr. Sheppard maintained that after filing a first step administrative remedy procedure (ARP-LSP-2011-1148), the reply from the DPSC asserted that he was granted the relief he had requested for proper medical attention, but that no actual relief had been forthcoming. He maintained that at the second step, his ARP

¹ Mr. Sheppard had previously injured his left shoulder in the 2005 Angola Prison Rodeo, resulting in a torn left rotator cuff.

was denied.

Mr. Sheppard prayed for: reparative surgery; medical inquiry into possible damage to his left rotary cuff; examination and treatment by a chiropractor; injections into his shoulder; blood testing to monitor the effects of his medication; written information regarding damage to his left major pectorial muscle and left rotary cuff; information about adverse effects attributable to his prescribed medication; and reimbursement for his costs.

The first step response to Mr. Sheppard's ARP provided a lengthy summation of Mr. Sheppard's medical history, with a conclusion that Mr. Sheppard's request to receive proper medical attention had been granted, that he had improved with injections, that shoulder exercises had been prescribed, and that he was to follow up in the orthopedic clinic as needed. The second step response to Mr. Sheppard's ARP stated that the medical care he had received and would continue to receive was deemed adequate, and that no further investigation would be conducted as the issue was clearly addressed in the first step response.

On January 5, 2012, by order of the commissioner,² the suit was reviewed, found to be a claim subject to appellate review in accordance with La. R.S. 15:1171, *et seq.*, and ordered to be served on the DPSC. On October 4, 2012, the DPSC filed an answer to the petition.³ The DPSC denied the allegations in Mr. Sheppard's brief and denied that Mr. Sheppard was entitled to any further relief. Also on October 4, 2012, the DPSC filed a motion to place documents under seal, which included Mr. Sheppard's medical records. On October 12, 2012, the commissioner ordered that the documents be sealed.

² The office of commissioner of the Nineteenth Judicial District Court was created by La. R.S. 13:711 to hear and recommend disposition of criminal and civil proceedings arising out of the incarceration of state prisoners. La. R.S. 13:713(A). The commissioner's written findings and recommendations are submitted to a district judge, who may accept, reject, or modify them. La. R.S. 13:713(C)(1), (2), & (5).

³ According to the DPSC's brief, it was not served with the petition until September 2012.

On May 30, 2013, the commissioner ordered the matter remanded to the DPSC, noting that “The response from the first and second step address the petitioner’s grievance where it relates to seeing a medical doctor, but does not look at whether the petitioner is to receive the requested and ‘required’ surgery.” The matter was ordered stayed for 90 days, “during which time this matter is remanded to the Second Step Respondent for consideration of and response to the claim in # LSP-2011-1148, on whether the granting of relief as given by the first step responder was to grant the petitioner the ‘required’ surgery that he seeks.” The Commissioner ordered the DPSC to reconsider the claim, render a final decision, and submit the Administrative Record, “as amended and expanded,” within 90 days.

In an amended response to the second step ARP, dated September 16, 2013, the DPSC stated that:

Further evaluation has been conducted in regards to your complaint of continuous shoulder pain and your request to have surgery. On 3/07/13 you were seen by your primary care physician and it was noted that you had complaints of trapezius pain. You were given a steroid injection and you stated that Ibuprofen did give some relief. A treatment plan was given that stated: return to telemed; continue neck stretching; continue Ibuprofen; and follow-up in six months. On 4/15/13 you were seen via telemed by the Neurosurgery department. It was noted that you stated that the depomedrol injection improved your symptoms for a week. The Neurosurgery Clinic determined that a face to face evaluation for consideration of surgical intervention was needed. On 5/09/13 you were seen again by LSP medical staff and it was noted to return in 18 months to the Neurology Clinic. Per LSP medical staff you were diagnosed with having tendonitis that was managed with P.O. (oral) medications, injections, physical therapy and Chiro. You continue to be seen on a regular basis and LSP medical staff has made another referral for you to be seen at the Neurosurgery Clinic. When the medical staff is informed of your appointment date and time, you will be transported accordingly. Medical opinion is controlling. The medical care you have received and will continue to receive is deemed adequate.

Your request for relief is denied.

On September 27, 2013, the DPSC filed a notice of compliance with the district court’s May 30, 2013 order, and also filed a motion and order to place

documents under seal, which included the amended response and Mr. Sheppard's supplemental medical records. Thereafter, the district court signed an order placing the documents under seal.

On January 14, 2015, a status conference was held by the commissioner, at which time the parties discussed Mr. Sheppard's medical care and his request for more time in the gym to perform his prescribed exercises. Mr. Sheppard's counsel stated that Mr. Sheppard's medication was inadequate for his pain, and asserted that surgery for his condition was medically necessary. Counsel for the DPSC stated that Mr. Sheppard was in a pain management program, was taking several different medications, and was continuing to seek care and treatment in "that program." Counsel for the DPSC further stated that "I don't know that scheduled surgery will be recommended, but I do know he is scheduled to be seen at the Neurosurgery Center." The commissioner asked the DPSC to do "that [which] can be done to maybe allow Mr. Sheppard, I guess, the gymnasium time so that he can get into the gym." Counsel for the DSPC then agreed to talk to the medical director about the situation.

On April 28, 2015, Mr. Sheppard filed a motion to supplement oral argument and the record. In response to the motion, on June 4, 2015, a status conference was held. The commissioner stated that the purpose of the conference was "to [ensure] there was no problem with either party's submission of the health care policies." On June 4, 2015, the commissioner ordered the record supplemented to include several DPSC health care policies and a March 26, 2015 letter from Assistant Warden Stephanie Lamartiniere to Mr. Sheppard. The letter from Ms. Lamartiniere notified Mr. Sheppard that after review of his medical record by Dr. Randy Lavespere (the Louisiana State Prison Medical Director), his duty status was unrestricted. The letter further stated that Mr. Sheppard could work out and/or exercise as desired, and that if he was working out regularly, medications such as

Neurontin (used for pain relief and seizures) and Baclofen (a muscle relaxer) were not indicated and would not be prescribed.

On December 5, 2014, Mr. Sheppard filed a motion asking for a ruling on the merits and maintaining that his petition for judicial review had been pending for over three years. Mr. Sheppard asked that the district court rule in his favor, reverse or modify the decision of the DPSC, and provide him with surgery.

The commissioner issued a recommendation on October 6, 2016, finding the DPSC decision arbitrary and capricious, and recommending that the DPSC provide Mr. Sheppard an appointment with an orthopedist, “for the surgery and reasonable recommended treatment, if any.”

The commissioner issued an amended recommendation on November 18, 2016, finding the DPSC decision arbitrary and capricious, and recommending that the DPSC obtain an appointment for Mr. Sheppard with an orthopedist, “that can properly treat, and perform the planned surgery if necessary, on [Mr. Sheppard’s] pectoralis tear, within 30 days.”

Mr. Sheppard filed an application for supervisory writs with this court, which granted the writ application and ordered the district court to render judgment on Mr. Sheppard’s petition for judicial review on or before January 18, 2017. **Sheppard v. Louisiana Department of Public Safety and Corrections**, 2016 CW 1325 (La. App. 1 Cir. 12/28/16).

On January 25, 2017, the commissioner issued a second amended recommendation, finding the DPSC decision arbitrary, capricious, and manifestly erroneous in light of the condition of the record, and recommending that the DPSC obtain an appointment with an orthopedist for Mr. Sheppard “that can properly treat [him], and perform the planned surgery, as surgical intervention is necessary, and should be performed as expeditiously as possible, on [his] pectoralis tear, but [in] no later than 30 days.”

On February 8, 2017, the DPSC filed a notice of compliance and traversal of the commissioner's recommendation. The DPSC maintained that "surgery has never been recommended for Mr. Sheppard's pectoralis tear, shoulder or cervical spine. Mr. Sheppard has been seen by the LSU/Charity orthopedist." The DPSC attached exhibits to their traversal, including chart review notes prepared by Dr. Lavespere, and physician's clinic notes from Mr. Sheppard's orthopedist appointments. Dr. Lavespere's review provides a listing of Mr. Sheppard's medical history and doctor visits, and concludes that "[t]here is not a single entry in [Mr. Sheppard's] chart by an Orthopedic Surgeon or a Neurosurgeon where surgery was recommended. **No surgery was recommended for his pectoralis tear, shoulder or cervical spine.** There were times during the diagnostic process that the surgeons were considering surgical repair pending test results, but, decisions were made by both groups **not to operate.**" Dr. Lavespere further stated "**At present, there are NO PLANS for [Mr. Sheppard] to have surgery on his neck, shoulder or pectora[li]s muscle.**"

The traversal included the physician's clinic notes from Mr. Sheppard's December 5, 2016 orthopedist appointment which state in part, "MRI of [left] shoulder in 2011 shows partial tearing of RTC" and "[patient] reports continued pain mostly from neck [radiating] to [left] scapula and shoulder." Under "Plan" the notes state "No surgery indicated for [patient's] shoulder, recommend Physical therapy?," "[follow up] 1 yr," and "OK for full duty."

The traversal also included the physician's clinic notes from Mr. Sheppard's February 6, 2017 orthopedist appointment, indicating his "Reason for Visit" as "ORTHO" and "1 Year [followup]." The notes state "Discharged from PT – max benefit" and lists specific exercises for Mr. Sheppard to perform. Further, under "Plan" the notes state "Ibuprofen 600 PO TID PRN pain," and "Continue [exercises with] cable machine," and "[no] surgical intervention – Chronic pec

tear.”

On February 16, 2017, the district court judgment rendered judgment in favor of Mr. Sheppard and against the DPSC, reversing the DPSC’s decision, finding that surgical intervention was necessary, and decreeing that the surgery should be performed as expeditiously as possible on Mr. Sheppard’s pectoralis tear, but in any event in no later than 15 days. The judgment also provided that the DPSC transport Mr. Sheppard to have the surgery performed, and provide proof of the appointment, as well as post-operative care, all at DPSC cost. The case was remanded for the medical evidence to be filed into the record. The DPSC appealed that judgment.

THE ASSIGNMENTS OF ERROR

In its appeal, the DPSC makes the following assignments of error.

1. The [district] court erred in ordering the [DPSC] to have surgery performed on [Mr.] Sheppard which has not been determined to be medically indicated by the outside orthopedic specialists who have examined and treated him.
2. The [district] court erred in finding the final [DPSC] decision arbitrary, capricious, characterized by an abuse of discretion and manifestly erroneous.
3. The [district] court erred in assessing all costs to the [DPSC].

STANDARD OF REVIEW

The district court may reverse or modify the administrative decision only if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (6) manifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record. La. R.S. 15:1177(A)(9). On review of

the district court's judgment under La. R.S. 15:1177, no deference is owed by the court of appeal to the factual findings or legal conclusions of the district court, just as no deference is owed by the Louisiana Supreme Court to factual findings or legal conclusions of the court of appeal. **Owens v. Stalder**, 2006-1120 (La. App. 1 Cir. 6/8/07), 965 So. 2d 886, 888.

ANALYSIS

Our review of the record shows that there has been no medical determination that surgery is necessary. There is a physician's clinic note dated February 28, 2011, stating "MRI ordered. Plan is for surgical repair following his MRI." However, there is a June 22, 2011 physician's clinic note that states "MRI done 3/10/11," and "Patient's motion limits study," "MRI Inconclusive," and "Awaiting Ortho eval."

The physician's clinic notes from Mr. Sheppard's December 5, 2016 orthopedist appointment state "No surgery indicated for [patient's] shoulder, recommend Physical therapy?," "[follow up] 1 yr," and "OK for full duty." The physician's clinic notes from Mr. Sheppard's February 6, 2017 orthopedist appointment indicate his "Reason for Visit" as "ORTHO" and "1 Year [followup]." The notes state "Discharged from PT – max benefit" and lists specific exercises for Mr. Sheppard to perform. Further, under "Plan" the notes state "Ibuprofen 600 PO TID PRN pain," and "Continue [exercises with] cable machine," and "[no] surgical intervention – Chronic pec tear."

Further, an MRI of Mr. Sheppard's neck was performed on December 18, 2012, and he was treated conservatively by a neurosurgeon. On July 7, 2014, neurosurgeon notes indicated "**NOT SURGICAL CASE.**" After review, we find no recommendation for surgery for Mr. Sheppard by either an orthopedist or a neurosurgeon in this case. The record before us reflects that Mr. Sheppard's condition had improved with chiropractic care, medication, steroid injections, and

prescribed exercises.

Thus, we find that the district court erred in finding that the DPSC was arbitrary and capricious in not providing Mr. Sheppard with surgery, and in reversing the DPSC decision and ordering that surgery be performed on Mr. Sheppard within 15 days.

CONCLUSION

For the foregoing reasons, we reverse the district court judgment. Further, we remand the case in order for Mr. Sheppard to have another orthopedic examination, for any follow-up testing as determined necessary by the orthopedist, and for the orthopedist to determine what course of medical treatment is indicated. The costs of this appeal are assessed to Mr. Sheppard.

REVERSED AND REMANDED WITH INSTRUCTIONS.