

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002410-MR

CONTINUECARE, INC.

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 96-CI-000948

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH SERVICES, ETC.;
BAPTIST HEALTHCARE SYSTEM
D/B/A BAPTIST HOSPITAL

APPELLEES

AND: NO. 1997-CA-002480-MR

LOURDES HOSPITAL, INC.;
LOURDES HOSPITAL CARE, INC. AND
BAPTIST HEALTHCARE SYSTEM
D/B/A BAPTIST HOSPITAL EAST

CROSS-APPELLANTS

v. CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 96-CI-000948

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH SERVICES, ETC.
AND CONTINUECARE, INC.

CROSS-APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, DYCHE AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. This is an appeal from an order of the Franklin Circuit Court vacating the decision of the Health Policy Board ("Board") and remanding the case to the Cabinet for Health Services ("Cabinet") for a rehearing on appellant, ContinueCare, Inc.'s ("ContinueCare") application for a certificate of need ("CON"). Cross-appellants, Baptist Healthcare System, Inc. d/b/a Baptist Hospital East Home Health Agency ("Baptist") and Lourdes Hospital, Inc. and Lourdes Home Care Inc. ("Lourdes") appeal Franklin Circuit Court's ruling that the principles of res judicata and collateral estoppel do not apply in this case. Upon reviewing the record and the applicable law, we affirm.

The present case involves a dispute regarding a CON for McCracken County, Kentucky. Effective June 21, 1995, all CON duties were transferred from the Interim Office of Health Planning and Certification to the Board under the Cabinet which is charged with establishing and promulgating standards for health care facilities in the Commonwealth and issuing CON's under KRS Chapter 216B. The legislature promulgated KRS Chapter 216B to ensure that all citizens in the Commonwealth have access to safe, adequate and efficient medical care, and to reduce unnecessary duplication and proliferation of health care services and facilities. Certain health facilities are required to obtain a CON prior to offering certain health services or to expanding the licenses' geographic service area of a home health agency. When evaluating a CON application, the Board is required to apply the statutory criteria set forth in KRS Chapter 216B.

Lourdes and Baptist are non-profit Kentucky corporations which operate acute care hospitals providing a wide array of health care services, including home health services, to the residents of McCracken County. ContinueCare is a Kentucky for-profit corporation which provides home health services in Calloway, Graves and Marshall counties in the Purchase Area Development District in Western Kentucky.

In early 1995 ContinueCare filed a CON application to expand its home health care services to McCracken County. According to KRS § 216B.040(2):

[The] issuance of denial of certificates of need...shall be limited to the following considerations:

- a. Consistency with plans. Each proposal approved by the cabinet shall be consistent with the state health plan....
- b. Need and accessibility. The proposal shall meet an identified need in a defined geographic area and be accessible to all residents in the area....¹

KRS § 216B.040(2).

At the time of ContinueCare's first application, the 1992-1995 State Health Plan ("the Plan") listed three criteria to determine whether an application for a CON for a home health agency met its standards. They are as follows:

1. An application for home health services shall not be approved if the affected ADD [area development district] has more

¹Other criteria not currently at issue include: interrelationships and linkages; cost, economic feasibility and resource availability; and quality of services. KRS § 216B.040(2).

than the maximum allowable number of FTE [full time equivalent] home health nurses, unless the application would delete capacity from a county with more than the maximum allowable nurses and add the same or less capacity to a county with less than the maximum allowable means.

2. In no case shall an allocation to add home health nurses in a county with more than the maximum number allowed for that county be considered consistent with this CON review standard, and the number of additional home health nurses approved shall not cause the county to exceed that maximum.
3. Preferences shall be given to applications that would add FTE nurses in counties where the largest number of additional nurses are allowed according to Appendix H, and to expansion of existing agency rather than the establishment of a new agency.

909 KAR 1:021E.

On June 15 and June 20, 1995, a public hearing was held on ContinueCare's application based on the above criteria. Lourdes and Baptist appeared at this hearing as affected parties in opposition to the application. ContinueCare's application was denied because it did not meet the requirements of Criteria 1 and 2 of the statutory provisions and regulatory requirements set forth under KRS § 216B.040(2). Specifically, the hearing officer found that the application was not in conformity with the Plan and that there was insufficient proof of an unmet need. As stated earlier, under the old Plan the Board reviewed the number of full-time equivalent registered nurses ("RN FTE's") to determine whether a need existed. If ContinueCare's application was approved, McCracken County would exceed the maximum number of

RN FTE's allowed under the then existing Plan. Thus, on July 28, 1995, the Board issued a hearing report denying ContinueCare's 1995 application.

In February, 1995, while ContinueCare's application was pending, Baptist applied for and received a CON to provide home health care services in McCracken County. According to Baptist's proposal, it projected serving 236 patients in McCracken County by 1998.

Effective October 13, 1995, the 1996-1998 Plan was adopted. The new Plan included different review criteria to determine whether applications for CON for home health services were consistent with the Plan. These new criteria are as follows:

1. An application to add home health services shall not be approved in any county that the applicant proposes to serve if the county does not show a projected need for home health services, as calculated in the more recent need projections.
2. An additional home health agency shall not be approved in a county unless there are at least 50 projected patients in need of home health services in the county as shown in the most recent home health need projections.
3. The applicant shall set forth its plan for care of patients without private insurance coverage and its plan for care of medically underserved populations. The applicant shall include demographic identification of underserved populations in the applicant's proposed service area and shall not deny services solely based on the patient's ability to pay.

909 KAR 1:021.

Thus, no longer was the Board required to review the number of RN FTE's in a county to determine need. Thereafter, on October 18, 1995, ContinueCare resubmitted its CON application, which is the subject of this appeal.

A hearing was held on the second application on February 5, 1996. This time the board concluded that ContinueCare's application should be approved under the new Plan finding that a need existed. However, the Board did not consider need in conjunction with the services already provided by Baptist, which CON was approved a year earlier projecting to serve 236 patients in McCracken County by the year 1998. Therefore, Baptist and Lourdes appealed the Board's decision to the Franklin Circuit Court. The court vacated the Board's decision and remanded the case to the Cabinet for a rehearing to include, but not limited to, consideration of intervening approval for services which may satisfy the Plan's projected need. This appeal followed.

Agencies are creatures of statutes and cannot exercise authority not vested in them. Dept. For Natural Resources and Env'tl. Protection v. Stearns Coal and Lumber Co., Ky., 563 S.W.2d 471 (1978). However, in reviewing an agency decision, courts may only overturn that decision if the agency acted arbitrarily or outside its scope of authority, if the decision itself is not supported by substantial evidence on the record, or if the agency applied an incorrect rule of law. Kentucky Board of Nursing v. Ward, Ky. App., 890 S.W.2d 641, 642 (1994). Courts are to give substantial deference to an agency's findings of fact. Bowling

v. Natural Resources & Env'tl. Protection Cabinet, Ky. App., 891 S.W.2d 406 (1994). However, when dealing with issues of law, the court may review de novo. Mill Street Church of Christ v. Hogan, Ky. App., 785 S.W.2d 263 (1990). Furthermore, where an administrative body has misapplied the legal effect of the facts, courts are not bound to accept the legal conclusions of the agency. Reis v. Campbell County Board of Education, Ky., 938 S.W.2d 885 (1996).

At issue is an administrative agency's application of the law to the facts. Hence, the trial court was not bound to accept the legal conclusions of the agency. Epsilon Trading Co. V. Revenue Cabinet, Ky. App., 775 S.W.2d 937, 940 (1989). Thus, the Board's decision was fully reviewable. Id.

ContinueCare argues that the lower court erred in remanding the case for review so that Baptist's CON can be considered in determining if unmet needs exist. ContinueCare strenuously argues that if the Board does so, it will violate the law because the guidelines under KRS 216B and the relevant regulations must be strictly adhered to. According to ContinueCare, reviewing the intervening approval of services is not a factor specifically enumerated to be considered. The court disagrees with this form over substance argument.

The 1996-1998 Plan clearly states that "An additional home health agency shall not be approved in a county unless there are at least 50 projected patients in need of home health services in the county as shown in the most recent home health need projections." The Plan in effect when ContinueCare's

application was approved identified a need for 227 additional patients for home health services. However, the record includes a projection by Baptist that it would serve 236 patients by 1998, nine more than the 227 projected by the Plan. Pursuant to the Plan, it was incumbent on the Board to review Baptist's services to determine whether an additional 50 patients had unmet needs before an additional CON could be approved. Without reviewing Baptist's services, the Board simply could not determine whether a need was present before approving another CON. Therefore, although ContinueCare is correct that the Plan must be strictly adhered to, such is to the detriment of ContinueCare's argument. For the reasons stated, we affirm the lower court's order remanding for reconsideration of need in light of the services already being provided by Baptist.

Baptist and Lourdes filed a cross-appeal alleging that the lower court erred in ruling that the principles of res judicata and collateral estoppel do not apply in this case. Before specifically addressing this issue, the Court will review a parallel issue concerning whether ContinueCare could even file another application at the time it did. According to 900 KAR 6:9(4), "An application for certification of need that is disapproved shall not be refiled for a period of twelve (12) months, absent a showing of a significant change in circumstances." It is undisputed that ContinueCare's second application was filed approximately three (3) months after its first one was denied. However, as stated earlier, the regulatory standard for determining need and approval of CON's changed

between the time the first and second applications were filed by ContinueCare. We agree with the lower court that such constitutes a "significant change in circumstances" allowing the refiling of an application within twelve (12) months. Thus, the lower court's finding that the hearing officer's ruling that no regulatory violation had occurred with respect to refiling the application is correct as a matter of law.

We now address the cross-appellants' res judicata and collateral estoppel arguments. The doctrine of res judicata holds:

[A] judgment on the merits in a prior suit involving the same parties or their privies bars a subsequent suit based upon the same cause of action. (Citations omitted)***

The general rule for determining the question of res judicata as between parties in actions embraces several conditions. First, there must be identity of the parties. Second, there must be identity of the two causes of action. Third, the action must be decided on the merits. In short, the rule of res judicata does not act as a bar if there are different issues or the questions of law presented are different.

Napier v. Jones, Ky. App., 925 S.W.2d 193, 195 (1996).

Although collateral estoppel is typically seen as a subdivision of res judicata in Kentucky, the effect of collateral estoppel is different. Id. (Citations omitted).

The basic distinction between the doctrines of res judicata and collateral estoppel, ... has frequently been emphasized. Thus, under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes the relitigation of issues actually litigated and

determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.

Id. (citing City of Louisville v. Louisville Professional Firefighters Ass'n., Ky., 813 S.W.2d 804, 807 (1991) (quoting Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1956))).

Baptist and Lourdes argue that Continue Care's second application was basically the same as the first, and that the hearing officer and the lower court erred in not applying the doctrines of res judicata and collateral estoppel. However, it is undisputed that the regulatory standards changed during the time between the two applications. Hence, the issue of need under the standard set forth in the 1996-98 Plan was not reviewed by the Board in considering ContinueCare's first application. Thus, res judicata and collateral estoppel cannot act as a bar. Therefore, this Court affirms the lower court's ruling.

ALL CONCUR.

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