

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002326-MR

MICHAEL A. PASSIDOMO, M.D.  
AND  
MICHAEL A. PASSIDOMO, P.S.C.

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER L. CRITTENDEN, JUDGE  
ACTION NO. 01-CI-00230

COMMONWEALTH OF KENTUCKY,  
CABINET FOR HEALTH SERVICES,  
DEPARTMENT FOR MEDICAID SERVICES

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, COMBS, AND DYCHE, JUDGES.

BUCKINGHAM, JUDGE: Dr. Michael A. Passidomo appeals from an order of the Franklin Circuit Court affirming a decision by the Kentucky Cabinet for Health Services which determined that Dr. Passidomo owed the Cabinet \$119,208.38 based on a denial of claims submitted by him for MRI<sup>1</sup> services provided to Medicaid recipients. We affirm.

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<sup>1</sup> Magnetic Resonance Imaging.

Dr. Passidomo was a neurologist practicing in Pikeville, Kentucky.<sup>2</sup> He was the only neurologist in Pike County, and he owned and operated Appalachian MRI, Inc., a clinic that provided MRI and other diagnostic services.<sup>3</sup> The clinic where the MRI scanner was located was not at the same location as Dr. Passidomo's office.

Vicky Cole, a registered nurse and investigator from the Surveillance and Utilization Review Subsystem (SURS) Branch of the Department of Medicaid Services conducted a review of Dr. Passidomo's records beginning in October 1993. This review covered claims for MRI services provided by Appalachian MRI, Inc., for the period from March 1, 1992, through June 30, 1993. The SURS review conducted at that time identified 141 identical claims submitted by Dr. Passidomo's clinic in which a precontrast MRI scan was performed on a particular Medicaid recipient followed one or two days later by a contrast-enhanced MRI scan for the same recipient.

The SURS review also included a sampling of Dr. Passidomo's patient records and MRI scans for 20 of the 141 claims at issue. Based on this review, it was determined that Dr. Passidomo failed to establish medical necessity for the

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<sup>2</sup> Dr. Passidomo is now retired.

<sup>3</sup> The entity, Appalachian MRI, Inc., was subsequently renamed Michael A. Passidomo, P.S.C.

performance of the contrast-enhanced MRI scans after the precontrast MRI scans had been performed and that there was no record of physician-patient contact regarding the performance of the contrast-enhanced scans. Nurse Cole therefore concluded that Dr. Passidomo's claims for MRI services totaling \$119,208.38 were improper.

Dr. Passidomo requested an administrative review of the denial pursuant to 907 KAR<sup>4</sup> 1:671, § 9. A hearing was held before an administrative law judge (ALJ) at which time the Cabinet presented the testimony of Nurse Cole, Nurse Caroline Combs, and Dr. James Lee. Dr. Passidomo testified on his own behalf and presented testimony from Dr. Murray Solomon. In a hearing report dated April 29, 1996, the ALJ determined that the Cabinet was entitled to recover the sum of \$119,208.38 from Dr. Passidomo. The Secretary of the Cabinet for Health Services adopted the ALJ's report as final on May 9, 1996.

Dr. Passidomo appealed this decision to the Franklin Circuit Court, which entered a judgment in favor of Dr. Passidomo on March 3, 1998. The court found that the Cabinet's actions were arbitrary. In particular, the court concluded that the Cabinet treated operators of low field scanners differently from those who operated high field scanners. Further, the court noted that questions remained concerning whether the contrast-

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<sup>4</sup> Kentucky Administrative Regulations.

enhanced scans were medically necessary and whether the use of two billing codes by Dr. Passidomo resulted in greater cost to the Medicaid program. Thus, the court reversed the ALJ's decision and remanded the case for further proceedings.

After the case was remanded, a new hearing officer was assigned to the case because the first ALJ had ended his employment with the Cabinet. Also, the parties agreed that the issue of the use of two billing codes would not be dispositive of the case. On December 22, 2000, the second hearing officer rendered Findings of Fact, Conclusions of Law, and Recommended Decision. In an eight-page decision, the hearing officer concluded that Dr. Passidomo "has failed to substantiate the medical necessity of the contrast-enhanced MRI scans via the medical records as required by the Manual." In short, the hearing officer ruled in favor of the Cabinet as to its right to recoup the money from Dr. Passidomo. On January 23, 2001, the Secretary for the Cabinet for Health Services adopted the hearing officer's report.

Dr. Passidomo once again appealed to the Franklin Circuit Court. The Cabinet filed a motion to dismiss the appeal for failure of Dr. Passidomo to exhaust his administrative remedies. In particular, the Cabinet argued that Dr. Passidomo's exceptions to the hearing officer's report were untimely filed. Finding that there was substantial reason to

believe that the Cabinet's usual practices concerning the entering and mailing of orders were not followed, the circuit court entered an order on April 5, 2002, directing the Secretary to consider Dr. Passidomo's exceptions.

After considering Dr. Passidomo's exceptions, the Secretary once again affirmed the hearing officer's report. The Secretary's order was entered on May 23, 2002. Rather than file a new appeal, a motion was filed in the same case in the Franklin Circuit Court submitting the matter for final adjudication.

The circuit court entered its final order on October 17, 2002. After presenting the procedural history of the case and reviewing the applicable case law involving a court's authority when reviewing an administrative agency action, the court then held as follows:

Having examined the record, the testimony of the individual's [sic] in question, and other evidence, this Court concludes that sufficient, admissible information exists to support the findings of fact made by the ALJ and the decision of the Cabinet that it is entitled to recoup the funds is supported by substantial evidence.

Dr. Passidomo's appeal to this court followed.

Dr. Passidomo's first argument is that the circuit court violated his due process rights by failing to produce an opinion capable of review by this court. Dr. Passidomo refers

to the court's opinion as "a cursory opinion." Dr. Passidomo's description of the court's opinion is correct to the extent it resolved the case in the one sentence set forth above and did not discuss what "substantial evidence" supported the Cabinet's decision.

This court stated in Commonwealth, Dept. of Educ. v. Commonwealth, Ky. App., 798 S.W.2d 464, 467 (1990), that "[t]he position of the circuit court in administrative matters is one of review, not reinterpretation." In reviewing the Cabinet's decision, the circuit court could review whether the Cabinet acted in excess of its granted powers, whether all parties were afforded due process of law, and whether the Cabinet's action was supported by substantial evidence. American Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Comm'n, Ky., 379 S.W.2d 450, 456 (1964). See also KRS<sup>5</sup> 13B.150. As it does not appear that there were issues concerning whether the Cabinet acted in excess of its granted powers or whether Dr. Passidomo was afforded his due process rights in connection with the Cabinet proceedings, Dr. Passidomo's complaint is that the circuit court did not explain its reasons for holding that the Cabinet's decision was supported by substantial evidence. Dr. Passidomo asserts that "the reviewing Circuit Court must clearly explain the reasoning that supports its action in order to

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<sup>5</sup> Kentucky Revised Statutes.

provide for meaningful appellate review." He maintains that the failure of the circuit court to explain its reasoning violates his due process rights.

It is true that the Cabinet was required to "make findings of basic evidentiary facts, as opposed to a simple statement which reaches a conclusion and quotes the words of a statute." Shields v. Pittsburg & Midway Coal Mining Co., Ky. App., 634 S.W.2d 440, 443 (1982). See also Caller v. Ison, Ky., 508 S.W.2d 776 (1974). However, these cases relate to the necessity of fact findings by an administrative agency and do not relate to fact findings to be made by the circuit court. Where circuit courts review administrative agency decisions, the court does not make additional fact findings but rather reviews the actions of the administrative agency. Commonwealth, Dep't of Educ., supra. In short, although the circuit court did not explain the reasons for its decision, it made the necessary determination concerning whether there was substantial evidence to support the Cabinet's decision. We find no error in the manner and form in which the court affirmed the Cabinet's decision.

Dr. Passidomo's second argument is that the court's decision was arbitrary and capricious because it was not supported by substantial evidence and was incorrect as a matter of law. His argument has three parts. First, he argues that

the circuit court committed clear error when it failed to identify the standard of medical practice for a neurologist in Pike County, Kentucky. Second, he argues that the circuit court failed to give Dr. Passidomo's testimony as a treating physician the weight to which it was entitled as a matter of law. Third, he argues that by affirming the Cabinet's decision, the circuit court erroneously upheld a decision that was not supported by substantial evidence.

In connection with the standard of medical practice for a neurologist in the Pike County area, Dr. Charles Lee, a neuroradiologist, testified on behalf of the Cabinet. The hearing officer determined that Dr. Lee, who practiced at the University of Kentucky, was an expert in neuroradiology and that Dr. Lee was familiar with the standard of medical practice in the nation and in Kentucky. Dr. Lee testified that he was familiar with Medicaid rules and policies regarding the medical necessity and use of MRI, that he was familiar with the medical standards in Eastern Kentucky because the University of Kentucky receives many referrals from the area, that he has experience using low field scanners, that he was familiar with applicable national and Kentucky standards, that he reads 40-50 scans per year from low field scanners which are referred to the radiology department from other neurosurgeons, and that the medical need for a contrast-enhanced MRI was no different for individuals



living in Lexington, Kentucky, than it was for individuals living in Pikeville, Kentucky. Based on his qualifications, training, and practice, Dr. Lee testified that the contrast-enhanced MRI scans provided by Dr. Passidomo were not medically necessary.

While Dr. Passidomo argues that Dr. Lee's testimony was "unreliable and entitled to no probative value," we believe otherwise. Rather, it appears obvious to us that Dr. Lee was qualified to give his opinion as to the medical necessity of the MRI scans. Furthermore, the Cabinet hearing officer was entitled to choose between the conflicting testimony presented to him.<sup>6</sup> See Square D Co. v. Tipton, Ky., 862 S.W.2d 308, 309 (1993).

The second part to Dr. Passidomo's second argument is that the Cabinet and the circuit court failed to give Dr. Passidomo's testimony as a treating physician the weight to which it was entitled as a matter of law. He argues that there is a "treating physician doctrine" under which courts must give the testimony of treating physicians deference over the testimony of nontreating physicians. Thus, he asserts that his

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<sup>6</sup> Dr. Arthur Solomon, a neuroradiologist, testified on behalf of Dr. Passidomo. Dr. Solomon testified that seventeen of the twenty contrast-enhanced MRI scans appeared to be medically necessary. However, Dr. Solomon testified that the medical necessity of the scans was outside his area of expertise.

testimony concerning medical necessity should have been given greater weight than the testimony of Dr. Lee.

Dr. Passidomo failed to cite any Kentucky case law which would support his position. Furthermore, the federal cases upon which he relies are distinguishable and do not persuade us to support his position. In short, it was for the fact finder to choose between the conflicting testimony of the experts, see Square D, supra, and Dr. Passidomo's testimony was not entitled to be given greater weight than the testimony of the other experts.

The last part of Dr. Passidomo's second argument is that the Cabinet's decision was not supported by substantial evidence. Specifically, he argues that the Cabinet "failed to substantiate the finding of medical necessity" and that the Secretary "did not articulate any facts to support that legal conclusion." In short, Dr. Passidomo's argument is that the Cabinet's decision was arbitrary as a matter of law because it was not supported by substantial evidence.

"So long as the agency's decision is supported by substantial evidence of probative value, it is not arbitrary and must be accepted as binding by the appellate court." Aubrey v. Office of Attorney Gen., Ky. App., 994 S.W.2d 516, 519 (1998). "Substantial evidence is defined as evidence of substance and relevant consequence, having the fitness to induce conviction in

the minds of reasonable people.” Id. “[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” Bowling v. Natural Resources, Ky. App., 891 S.W.2d 406, 410 (1994), quoting Kentucky State Racing Comm’n v. Fuller, Ky., 481 S.W.2d 298, 307 (1972).

Dr. Lee testified that the contrast-enhanced MRI scans performed by Dr. Passidomo were not medically necessary. Dr. Solomon testified that seventeen of the twenty contrast-enhanced MRI scans performed by Dr. Passidomo appeared to be medically justified. However, Dr. Solomon also testified that the medical necessity of the scans was outside his area of expertise. Dr. Passidomo testified that the scans were medically necessary.

Dr. Passidomo challenges the value and credibility of Dr. Lee’s testimony. However, “the trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it.” Bowling, 891 S.W.2d at 409-10. “[I]t is the exclusive province of the administrative trier of fact to pass upon the credibility of witnesses, and the weight of the evidence.” Id., citing Kentucky State Racing Comm’n, supra. We conclude there was substantial evidence to support the findings and conclusions of the hearing officer.

The order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Holly J. Turner  
Lisa English Hinkle  
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Lisa English Hinkle  
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BRIEF AND ORAL ARGUMENT FOR  
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