IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ida J. Carn	:	
	:	
v.	:	
	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	No. 1132 C.D. 2010
Appellant	:	Submitted: November 12, 2010

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI Filed: January 6, 2011

The Pennsylvania Department of Transportation, Bureau of Driver Licensing (Department) appeals from an order of the Court of Common Pleas of Lycoming County (trial court) sustaining the appeal of Ida Carn (Licensee) from an indefinite suspension of her operating privilege on grounds of incompetency, which the Department imposed pursuant to Section 1519(c) of the Vehicle Code (Code).[1] Finding no error in the trial court's decision, we affirm.

[1] 75 Pa.C.S. §1519(c). That section provides as follows:

> **(c) Recall or suspension of operating privilege.—** The department shall recall the operating privilege of any person whose incompetency has been established

(Footnote continued on next page…)

On December 9, 2009, Dr. Militza Ausmanas filed a DL-13 Initial Reporting Form with the Department indicating that Licensee had a vision deficiency specified as "double vision." Reproduced Record (R.R.) at 47a. Dr. Ausmanas also checked the box marked "Other Medical Condition that would interfere with the patient's ability to drive," and provided the following explanation: "double vision while driving, recent falls, mental status changes, recent hallucinations." *Id.* He indicated on the form that Licensee should lose her driving privilege immediately. *Id.* Thereafter, the Department sent Licensee a letter dated January 2, 2010, stating that based upon medical information it had received indicating that she had a psychiatric and vision deficiency condition which prevented her from safely operating a motor vehicle, her driving privilege was being recalled indefinitely as mandated by Section 1519(c) of the Code. R.R. at 45a. This notice also advised Licensee that the recall would "remain in effect until we [the Department] receive medical information that your condition has improved and you are able to safely

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(continued…)

> under the provisions of this chapter. The recall shall be for an indefinite period until satisfactory evidence is presented to the department in accordance with regulations to establish that such person is competent to drive a motor vehicle. The department shall suspend the operating privilege of any person who refuses or fails to comply with the requirements of this section until that person does comply and that person's competency to drive is established. Any person aggrieved by recall or suspension of the operating privilege may appeal in the manner provided in section 1550. The judicial review shall be limited to whether the person is competent to drive in accordance with the provisions of the regulations promulgated under section 1517 (relating to Medical Advisory Board).

operate a motor vehicle." *Id.* Enclosed with the Department's letter were a General Psychiatric Form and a Report of Eye Examination Form.

After receiving the Department's recall letter, Licensee underwent an eye examination with licensed optometrist Joel Getty (Dr. Getty). Dr. Getty completed the Department's Report of Eye Examination Form on January 13, 2010, indicating that Licensee's combined vision was 20/40 or better, with correction. R.R. at 44a. Dr. Getty also stated that Licensee's condition did not warrant monitoring by the Department and there were no other conditions or diseases that would make her an unsafe driver. *Id.*

Dr. Kimberly Jones (Dr. Jones), Licensee's primary physician, completed the Department's General Psychiatric Form on January 18, 2010. Dr. Jones indicated on this form that she had been treating Licensee for over 7 months, and Licensee had been diagnosed with hypertension and osteoporosis but had not been diagnosed with any mental or emotional disorders. R.R. at 43a. In response to the question, "From a medical standpoint only, do you consider this person physically and/or mentally competent to operate a motor vehicle under the stresses and challenges associated with driving," Dr. Jones indicated "yes." *Id.*

The Department then mailed Licensee two letters, both dated January 27, 2010. The letter which is at the heart of this appeal stated that Licensee must take and successfully pass a driving examination, consisting solely of an on-road driving test, in order to determine if she meets the Department's medical and physical

standards for driving. R.R. at 40a. The second letter stated that the Department added a corrective lenses restriction to Licensee's driver's license. R.R. at 42a.

Licensee appealed her license suspension to the trial court and a hearing was scheduled for May 14, 2010. At the hearing, neither party presented any witnesses or additional evidence; instead, they relied solely upon argument and the Department forms discussed above. Notably, counsel for the Department agreed on the record that for medical purposes, Licensee was competent. R.R. at 13a. Nonetheless, the Department argued it could still require Licensee to take and successfully pass a driving test prior to reinstating her driving privileges, pursuant to Section 1519(a) of the Code. Licensee's counsel noted that Dr. Ausmanas, who filled out the initial report, never actually spoke to Licensee, never treated her previously, and the subsequent report indicating that Licensee was capable of safely operating a motor vehicle was submitted by a physician who had personally been treating Licensee for over 7 months. R.R. at 18a. Licensee's counsel argued that the General Psychiatric Form and Report of Eye Examination Form were enough to rebut the Department's *prima facie* case and prove that Licensee was competent to operate a motor vehicle. Because the Department did not provide any additional evidence, Licensee submitted the medical information requested by the Department, and the Department agreed that she was medically competent; Licensee's counsel argued that her driver's license should be reinstated. The trial court sustained Licensee's appeal, holding that she successfully rebutted the Department's *prima facie* case and that the Department did not meet its burden of persuasion with respect to competency. Because the Department did not show cause to believe Licensee was not physically or

mentally qualified to drive, it could not require her to submit to a driving test. This appeal followed.[2]

Contrary to the Department's assertions, the trial court did not hold that the Department lacked the authority to require Licensee to submit to a driving test. The trial court specifically cited several of this Court's opinions for the well-settled rule that "once [the Department] has cause to believe a licensed driver may not be physically or mentally qualified to drive, 75 Pa.C.S. §1519(a) (determination of incompetency) provides the authority to require the driver to undergo one or more of the examinations for new driver's license applicants or for license renewal applicants." *Turk v. Department of Transportation, Bureau of Driver Licensing*, 983 A.2d 805, 814 (Pa. Cmwlth. 2009) (citing *Neimeister v. Department of Transportation, Bureau of Driver Licensing*, 916 A.2d 712 (Pa. Cmwlth. 2006), *Montchal v. Department of Transportation, Bureau of Driver Licensing*, 794 A.2d 973 (Pa. Cmwlth. 2002)). The list of appropriate examinations which may be required includes an actual driving test. *Turk*, 983 A.2d at 814; *see also* 75 Pa.C.S. §§1508(a), 1514(b).

However, the trial court correctly pointed out that in an appeal of a license suspension, the Department must meet its burden with respect to competency in order to support the license suspension or recall as well as any examinations it may have requested. The Department bears the ultimate burden of proving incompetency

[2] Our scope of review is limited to determining whether the trial court committed an error of law or abuse of discretion, and whether the trial court's necessary findings are supported by substantial evidence. *Byler v. Department of Transportation, Bureau of Driver Licensing*, 883 A.2d 724, 727 n.2 (Pa. Cmwlth. 2005).

by a preponderance of the evidence. *Byler v. Department of Transportation, Bureau of Driver Licensing*, 883 A.2d 724, 728 (Pa. Cmwlth. 2005). We have outlined the burden shifting scheme involved in such cases as follows:

> [The Department]'s burden at a *de novo* hearing, to prove that the driver suffered from a medical condition on the date of recall that rendered him incompetent to drive, may be satisfied by the introduction of the medical report which [the Department] relied upon in recalling the driver's license. This would establish [the Department]'s *prima facie* case and would shift the burden of going forward with the evidence to the licensee. If the licensee presents evidence at the hearing that he was, in fact, competent to drive on the date of recall, or that he has become competent to drive since the time that his license was recalled and the date of the hearing, then, naturally, [the Department] would most likely need to present testimonial evidence in order to prove incompetency. The burden of persuasion never leaves [the Department]. . . .

Reynolds v. Department of Transportation, Bureau of Driver Licensing, 694 A.2d 361, 364 (Pa. Cmwlth. 1997). The trial court held the Department did not meet its ultimate burden in this case, and we agree.

The trial court recognized that the Initial Reporting Form submitted by Dr. Ausmanas, indicating that Licensee was suffering from "double vision while driving, recent falls, mental status changes, [and] recent hallucinations," was enough to establish the Department's *prima facie* case of incompetency. However, Licensee

offered specific evidence to rebut the Department's case in the reports from Dr. Jones and Dr. Getty, both of whom evaluated her after her license was recalled. Dr. Jones, Licensee's treating physician, examined her and submitted a report to the Department indicating that while Licensee suffered from disorders including hypertension and osteoporosis, from a medical standpoint, she was "physically and/or mentally competent to operate a motor vehicle under the stresses and challenges associated with driving." R.R. at 43a. Dr. Getty's report indicated that Licensee's vision was better than 20/40 with correction, she did not have a condition which warranted monitoring by the Department, and there were no conditions that made her an unsafe driver. Notably, Dr. Ausmanas was not Licensee's treating physician nor did he speak with her regarding the issues he outlined on the Initial Reporting Form.

As the ultimate finder of fact, it is within the trial court's discretion to make credibility and persuasiveness determinations. *Byler*, 883 A.2d at 729. In making a determination whether a licensee has carried her burden of proving competency to drive, a court may consider "the timing and issuance of multiple forms, the conflicting statements contained on the forms and the lack of clarity regarding the extent to which [a] Physician's opinions were based on current examinations." *Turk*, 983 A.2d at 815. The trial court stressed the fact that Dr. Ausmanas was not Licensee's treating physician, he apparently did not examine or speak with her with respect to the issues he reported to the Department, and Licensee's actual physician who had been treating her for over seven months provided significantly more detail about her mental and physical health and clearly indicated she was competent to drive. This information was corroborated by Dr. Getty's report. Based upon all of the above information, the trial court found

Licensee's evidence to be more persuasive and credible and determined that she successfully rebutted the Department's *prima facie* case regarding competency. Under *Reynolds*, the burden then returned to the Department. However, the Department failed to provide any additional evidence regarding Licensee's competency, resting instead upon the initial form submitted by Dr. Ausmanas and what it considered to be conflicting medical testimony. The Department also agreed at the trial court hearing that, for medical purposes, Licensee is competent. Given this admission and the Department's failure to put forth any additional evidence or testimony, the Department clearly did not meet its burden of proof regarding competency and the trial court's decision is supported by substantial evidence.

Accordingly, the order of the trial court is affirmed.

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DAN PELLEGRINI, JUDGE

President Judge Leadbetter concurs in the result only.

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O R D E R

AND NOW, this 6th day of January, 2011, the order of the Court of Common Pleas of Lycoming County, dated May 25, 2010, is affirmed.

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DAN PELLEGRINI, JUDGE