

RENDERED: SEPTEMBER 26, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002646-MR

W. REX DUFF, M.D.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 05-CI-003188

KENTUCKY BOARD OF
MEDICAL LICENSURE

APPELLEE

OPINION
VACATING AND REMANDING
WITH DIRECTIONS

** ** * ** * ** *

BEFORE: KELLER, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: W. Rex Duff, M.D. brings this appeal from a December 4, 2006, order and opinion of the Jefferson Circuit Court affirming a March 10, 2005, Kentucky Board of Medical Licensure's Order of Indefinite Restriction upon Duff's

license to practice medicine in this Commonwealth. We vacate and remand with directions.

In March 2005, the Kentucky Board of Medical Licensure (Board) rendered an Order of Indefinite Restriction upon the medical license of Duff. This action stemmed from Duff's practice of bariatric medicine, which in layperson terms is the treatment of obesity. In particular, the Board found that Duff improperly prescribed the weight loss drug phentermine (a Schedule IV amphetamine or amphetamine-like controlled substance), failed to adequately monitor his patients, and engaged in uniform or rote approach to the treatment of his patients.

Duff sought judicial review of the Board's order in the Jefferson Circuit Court. Kentucky Revised Statutes (KRS) 311.593. By order and opinion entered December 4, 2006, the circuit court affirmed the Board's order. This appeal follows.

Duff raises sundry allegations of error. We view all to be without merit except for one – Duff's allegation that the Board utilized the incorrect administrative regulation (201 Kentucky Administrative Regulations (KAR) 9:016 – amended effective February 7, 2002) to find that Duff engaged in dishonorable, unethical or unprofessional conduct in violation of KRS 311.595(9) in its Order of Indefinite Restriction.

Judicial review of an administrative agency's decision is concerned with arbitrariness. *Am. Beauty Homes Corp. v. Louisville and Jefferson County*

Planning and Zoning Comm'n, 379 S.W.2d 450 (Ky. 1964). When reviewing an action of the Board of Medical Licensure, we are required to determine whether the Board exceeded its statutory powers, whether it provided adequate due process of law, and whether substantial evidence supports its action. KRS 311.555; KRS 311.591; *Parrish v. Kentucky Bd. of Med. Licensure*, 145 S.W.3d 401 (Ky.App. 2004). However, our Court reviews issues of law *de novo*. *Parrish*, 145 S.W.3d 401.

In its case against Duff, the Board's expert, Dr. Carl Schmidt, reviewed seven patients' charts and testified concerning Duff's treatment of these patients.¹ Six of these patients had various treatment dates between 1999 and 2001, and only one patient had a single treatment date after February 7, 2002, which was on March 1, 2002. All seven patients were prescribed phentermine. Phentermine is classified as a Schedule IV amphetamine or amphetamine-like controlled substance.

Based upon Duff's practice in regard to these seven patients, the Board found:

Duff's medical practice for prescribing phentermine did not comply with the Board's regulation, 201 KAR 9:016, or the guidelines in Exhibit 1 for prescribing such controlled substances. Therefore, his prescription practice constituted dishonorable, unethical or unprofessional conduct pursuant to the provisions of

¹ The Kentucky Board of Medical Licensure's entire case against W. Rex Duff, M.D. centered around the expert's review of these seven patients' charts. There were no patient complaints involved, and each of these patients fell into a patient category in Duff's practice that were prescribed the drug phentermine.

201 KAR 9:016, Section 3, and subjects him to discipline pursuant to KRS 311.595(9).

Duff adamantly argues that the Board erred in its reliance upon 201 KAR 9:016.

201 KAR 9:016 was amended effective February 7, 2002. It is uncontroverted that the pre-amended version of 201 KAR 9:016 did not regulate Schedule IV amphetamine or amphetamine-like controlled substances and, thus, did not regulate the prescribing of phentermine. Rather, the pre-amended version only regulated Schedule II amphetamine or amphetamine-like controlled substances. It was only after the amendment of 201 KAR 9:016, on February 7, 2002, that Schedule IV amphetamine or amphetamine-like controlled substances were included within its regulatory scheme.

As previously pointed out, six of the seven patients' charts relied upon by the Board reflected that these patients were treated and prescribed phentermine before February 7, 2002, the effective date of 201 KAR 9:016 amendment. Only one patient was treated and prescribed phentermine after the effective date of the amendment to 201 KAR 9:016. Nevertheless, the Board's opinion does not reflect that fact. Rather, the Board found that Duff violated 201 KAR 9:016 by his practice of prescribing phentermine and relied upon the charts of all seven patients. In its appellate brief, the Board argues that the amended version of 201 KAR 9:016 was properly applied because “as a general rule, a court must apply the law in effect at the time it renders its decisions.”

Generally, the statute or regulation in effect at the time of the act is controlling. *Peach v. 21 Brands Distillery*, 580 S.W.2d 235 (Ky.App. 1979). And, a statute or regulation will always be interpreted to operate prospectively unless a clear intention to the contrary is expressed or necessarily inferred. *Webster County Bd. of Educ. v. Hockett*, 102 S.W.2d 1018 (Ky. 1937).

With the amendment of 201 KAR 9:016 on February 7, 2002, the Board enacted a comprehensive regulatory scheme in relation to Schedule IV amphetamine or amphetamine-like substances. It places specific and detailed procedures and requirements upon a physician in relation to prescribing these controlled substances. In short, the amended version of 201 KAR 9:016 imposed by force of law prescription criteria for Schedule II controlled substances upon a physician. To apply the amended version of 201 KAR 9:016 retroactively would not only be fundamentally unfair but would impermissibly impose new legal duties upon a physician. See *Peach*, 580 S.W.2d 235.

The Board counters that the amended version of 201 KAR 9:016 did not impose new duties upon a physician because these duties were outlined in “Guidelines” that were adopted by the Board on December 18, 1996. In particular, the Board points to its Guidelines for Prescribing Amphetamine, Amphetamine-Like And Anorectic Controlled Substances (Schedule III & IV). We recognize that the Guidelines provide for substantially the same duties in regard to prescribing Schedule IV controlled substances as the amended version of 201 KAR 9:016. But, unlike 201 KAR 9:016, the Guidelines were not enacted as a regulation and, *a*

fortiori, do not carry the legal effect thereof. While the Board cited to the Guidelines as authority in its Order of Indefinite Restriction, the Board has not directed this Court to the authority under which the Guidelines were “adopted” or the legal effect, if any, of the Guidelines.

Since the focus of the entire case against Duff looked to the treatment of seven patients who were prescribed phentermine, we remand this action to the circuit court with directions to remand to the Board. Upon remand to the Board, the Board shall reconsider its Order of Indefinite Restriction. In so doing, the Board shall not utilize 201 KAR 9:016 as amended February 7, 2002, for actions by Duff that occurred before February 7, 2002. However, the Board may apply the Guidelines if there exists legal authority for such application to this case. We note that no such authority has been cited to date nor has the Board adequately explained how the Guidelines may be applied to determine a violation of KRS 311.595(9).

For the foregoing reasons, the order and opinion of the Jefferson Circuit Court is vacated and this cause is remanded with directions to remand to the Kentucky Board of Medical Licensure for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

J. Fox DeMoisey
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Karen Quinn
Kentucky Board of Medical Licensure
Louisville, Kentucky