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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000741-MR

JOHN T. EBERT, M.D.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 09-CI-011524

SUSAN DURANT; TAD THOMAS;
KENTUCKY BOARD OF MEDICAL
LICENSURE; C. WILLIAM SCHMIDT;
PRESTON NUNNELLEY, M.D. AND
KAREN QUINN

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, COMBS, AND VANMETER, JUDGES.

VANMETER, JUDGE: John Ebert, M.D., appeals *pro se* from an order of the Jefferson Circuit Court dismissing his petition for judicial review of an adverse determination of the Kentucky Board of Medical Licensure (“KBML”). The sole

issue before us is whether the circuit court correctly dismissed Ebert's petition because it had not been filed within the 30 days prescribed by statute. Upon review, we hold that the court correctly dismissed the petition as untimely filed and we affirm.

Since 2005, Ebert and Appellees¹ have been involved in protracted litigation concerning Ebert's ability and license to practice medicine. Since then, the KBML has issued numerous complaints against Ebert. On January 27, 2009, a full administrative hearing was held on the KBML's third complaint against Ebert; Ebert failed to appear and the hearing was held in his absence. That proceeding resulted in a final administrative order entered on June 4, 2009 revoking Ebert's license to practice medicine. A copy of this final order was mailed to Ebert that day.

Ebert did not appeal that final order until November 20, 2009, at which time he filed the underlying petition for review in the Jefferson Circuit Court, Case No. 09-CI-11524. In his petition, Ebert alleged that the KBML acted arbitrarily and capriciously by denying him "a fair trial like setting" and denied his due process rights. Ebert admitted to having received the final order on June 5, 2009, and stated that he had "attempted to comply" with the provisions of KRS² 13B.140, governing the right to appeal an administrative final order, by mailing documents

¹ Susan Durant, Tad Thomas, KBML, C. Williams Schmidt, Preston Nunnelley, M.D. and Karen Quinn.

² Kentucky Revised Statutes.

to a Jefferson Circuit Court judge on July 6, 2009.³ Appellees moved to dismiss Ebert's appeal as untimely filed. The circuit court granted the motion, finding that Ebert's November 20, 2009 petition for review of the June 4, 2009, order was not filed within 30 days as required under KRS 13B.140(1) and thus the court lacked jurisdiction over the appeal as a matter of law. This appeal followed.⁴

On appeal, Ebert claims that he timely filed a petition for review on July 6, 2009, and the circuit court erred by dismissing his appeal as untimely. He points to his "substantial compliance" with the statutory requirements, as well as the "savings statute," in support of his claim. We do not find merit in either of his arguments and therefore affirm.

KRS 311.593 and KRS13B.140 set forth the requirements and deadline for filing a petition for judicial review of a final order of the KBML. *Gallien v. Kentucky Bd. of Med. Licensure*, 336 S.W.3d 924, 928 (Ky. App. 2011).

KRS 311.593(2) provides:

Any physician who is aggrieved by a final order of the board denying a license or rendering disciplinary action against a licensee may seek judicial review of the order by filing a petition with the Circuit Court of the county in which the board's offices are located in accordance with KRS Chapter 13B.

³ The deadline for Ebert's petition for judicial review fell on July 4, 2009, a federal holiday as well as a Saturday, thus Ebert had until the next business day, July 6, 2009, to file his appeal.

⁴ Ebert's notice of appeal originally sought review of final orders dating back to February 6, 2006. In a ruling dated February 8, 2012, this court granted Appellees' joint motion to dismiss appeal to the extent that the issue on appeal was to be limited to the circuit court's dismissal of Case No. 09-CI-11524.

KRS 13B.140(1) states, in relevant part, that “[a] party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency’s enabling statutes, *within thirty (30) days after the final order of the agency is mailed or delivered by personal service.*” (emphasis added). “[T]hese statutes, when read together, impose a 30-day period of limitations for an aggrieved party to challenge a final order of the Board regarding a disciplinary action.” *Gallien*, 336 S.W.3d at 928.

Here, the final order was issued and mailed to Ebert on June 4, 2009. On November 20, 2009, over five months later, Ebert filed his petition for review of that order. Ebert maintains that he “attempted to comply” with the statutory requirements by mailing documents to a Jefferson Circuit Court Judge on July 6, 2009, and that jurisdiction was thereby conferred upon the circuit court. However, Kentucky courts have consistently held that “attempted” or “substantial” compliance is insufficient to bestow appellate jurisdiction on the circuit court when the statutory requirements demand “strict compliance.” *See Bd. of Adjustments of City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978); *Gallien*, 336 S.W.3d at 928; *Spencer County Pres., Inc. v. Beacon Hill, LLC*, 214 S.W.3d 327, 329 (Ky. App. 2007); *Ky. Unemployment Ins. Comm’n v. Providian Agency Group, Inc.*, 981 S.W.2d 138, 139-40 (Ky. App. 1998); *Taylor v. Duke*, 896 S.W.2d 618, 621 (Ky. App. 1995). Indeed, in *Gallien*, this court affirmed a circuit court’s dismissal of a petition for judicial review in an analogous case involving the KBML and a

physician who filed a belated petition for judicial review. *Gallien*, 336 S.W.3d at

928. Specifically, this court held:

“[when] an appeal is filed in the circuit court by grant of a statute, as in this case, the parties must strictly comply with the dictates of that statute.” This is because “[a]n appeal from an administrative decision is a matter of legislative grace and not a right, and thus the failure to strictly follow statutory guidelines for the appeal is fatal.” The circuit court concluded that it lacked jurisdiction to consider Appellant’s petition for judicial review because the petition had not been timely filed within the statutory 30-day period; thus, dismissal was merited. This conclusion was the correct one.

Id. (internal citations omitted). Similarly, here, the circuit court correctly concluded that it lacked jurisdiction to entertain Ebert’s appeal which was filed outside the 30-day filing deadline contained in KRS 13B.140.

Ebert further asserts that the circuit court erred by dismissing his appeal because he timely “instituted” an action pursuant to the “savings statute” in KRS 413.270, which states:

(1) If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety (90) days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation.

(2) As used in this section, “court” means all courts, commissions, and boards which are judicial or quasi-judicial tribunals authorized by the Constitution or statutes of the Commonwealth of Kentucky or of the United States of America.

While KRS 413.270 can apply to judicial review proceedings, it does not apply to this case. In order to invoke KRS 413.270, Ebert must have “commenced” an appeal of the June 4, 2009, final order within the 30-day statutory limitation period. Ebert claims that mailing documents to the circuit court judge on July 6, 2009 was sufficient to “commence” an appeal. Yet he simultaneously concedes that he merely “attempted to comply” with the statutory provisions of KRS 13B.140. Ebert also admits that he did not file his July 6, 2009, petition with the Jefferson Circuit Court Clerk as required. Based on his admissions, no appeal was “commenced” on July 6, 2009 so as to “save” the November 20, 2009 petition. Because no action was filed on July 6, 2009, the November 20, 2009 petition for judicial review stands alone as an appeal filed more than 30 days after the mailing of the final administrative order. As a result, the circuit court properly dismissed Ebert’s appeal as untimely filed.

The February 12, 2010, order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John T. Ebert, M.D., Pro se
Hopkinsville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Nicole H. Pang
Assistant Attorney General
Frankfort, Kentucky

Leanne K. Diakov
Assistant General Council
Louisville, Kentucky