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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001042-MR

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; AND AUDREY TAYSE HAYNES, IN HER OFFICIAL CAPACITY AS SECRETARY — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 15-CI-00528

ABS LINCS KY, LLC, D/B/A CUMBERLAND HALL HOSPITAL; UNITED HEALTHCARE OF HARDIN, INC., D/B/A LINCOLN TRAIL BEHAVIORAL HEALTH SYSTEM; UHS OF RIDGE, LLC, I, D/B/A THE RIDGE BEHAVIORAL HEALTH SYSTEM; UHS OF RIDGE, LLC, D/B/A THE RIDGE BEHAVIORAL HEALTH SYSTEM; UHS OF BOWLING GREEN, LLC, D/B/A RIVENDELL BEHAVIORAL HEALTH SYSTEM; TBD ACQUISITION, LLC, D/B/A THE BROOK HOSPITAL-DUPONT; AND KMI ACQUISITION, LLC, D/B/A THE BROOK HOSPITAL, KMI — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: ACREE, KRAMER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: The Commonwealth of Kentucky, Cabinet for Health and Family Services and Audrey Tayse Haynes, in her official capacity as the Secretary of the Cabinet for Health and Family Services (collectively "the Cabinet"),[1] bring this appeal from a May 23, 2017, opinion and order of the Franklin Circuit Court reversing in part a final order issued by Secretary Haynes regarding appellees' administrative appeals of their per diem Medicaid payment rates. We affirm.

The administrative record is not before us as it inexplicably was not transmitted to the trial court.[2] However, the essential facts are not disputed. Appellees are six affiliated freestanding psychiatric hospitals providing inpatient behavioral health services. They filed administrative actions challenging their per diem Medicaid reimbursement rates for the period between July 1, 2011, and July 1, 2014, which are governed by 907 Kentucky Administrative Regulations (KAR) 10:815. For purposes of this appeal, the two main issues were: 1) whether the "parity factor" called for in 907 KAR 10:815 § 3 (2)(e) was valid; and 2) whether

[1] Adam Meier was appointed Secretary of the Cabinet in May 2018, but the Cabinet has not moved pursuant to Kentucky Rule of Civil Procedure 25.04 to substitute him as a party.

[2] The trial court's Opinion and Order cites to various portions of the administrative record—even though that record was not before it. The Cabinet argues those citations require reversal. But the Cabinet was charged with transmitting the administrative record to the circuit court under Kentucky Revised Statutes 13B.140(3). A party is not entitled to relief for errors springing from a failure to perform its statutory duties. The trial court should not have cited to materials outside the record, but that error is harmless since a) the Cabinet was responsible for transmitting the administrative record to the trial court, and b) the Cabinet does not argue the citations inaccurately reflect the administrative record.

the 65 percent depreciation rate found in §15 of that regulation was valid.[3] A hearing officer found both to be enforceable, and the Secretary agreed.

Appellees then petitioned the Franklin Circuit Court for review pursuant to Kentucky Revised Statutes (KRS) 13B.150. The case was submitted on cross-motions for summary judgment and, at the trial court's direction, both appellants and appellees submitted proposed findings of fact and conclusions of law. The trial court adopted the appellees' proposed findings on the parity factor and the 65 percent depreciation rule. Appellants then filed this appeal.

Before we address the merits, we must resolve the Cabinet's argument that the trial court committed reversible error by adopting appellees' tendered findings of fact and conclusions of law. It is not inherently improper for a trial court to request proposed findings from both parties and to thereafter adopt one

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[3] 907 Kentucky Administrative Regulations (KAR) 10:815 § 3 provides in relevant part:

> (1) The department shall reimburse for inpatient care provided to eligible Medicaid recipients in an in-state freestanding psychiatric hospital . . . on a per diem basis.
>
> (2) The department shall calculate a per diem rate by:
>
> . . . .
>
> (e) Applying a parity factor equivalent to aggregate cost coverage established by the DRG [diagnostic related group] reimbursement methodology established in 907 KAR 10:825 . . . .

907 KAR 10:815 § 15 states that "[t]he allowable amount for depreciation on a hospital building and fixtures, excluding major movable equipment, shall be sixty-five (65) percent of the reported depreciation amount as shown in the hospital's cost reports."

party's findings. *Prater v. Cabinet for Human Resources*, 954 S.W.2d 954, 956 (Ky. 1997). Adopting findings prepared by counsel is even more accepted when reviewing an administrative agency's decision. *Our Lady of the Woods, Inc. v. Commonwealth, Health Facilities and Health Services Certificate of Need and Licensure Board*, 655 S.W.2d 14, 16 (Ky. App. 1982). In any event, the trial court obviously gave independent thought to the matter since it rejected appellees' arguments regarding their entitlement to interest (an issue not raised on appeal) and drafted its own findings favorable to the Cabinet on that issue.

The Cabinet's first substantive argument is that the trial court erred by striking down the parity factor. However, the Cabinet's convoluted argument is contrary to our holding in *Northern Kentucky Mental Health-Mental Retardation Regional Board, Inc. v. Commonwealth, Cabinet for Health and Family Services*, 538 S.W.3d 298 (Ky. App. 2017), which became final while this appeal was pending once the Kentucky Supreme Court denied discretionary review.

Because it resolves the Cabinet's argument, we quote at length from *Northern Kentucky*:

> Northkey [Community Care] raises two issues on appeal. The first and primary argument is that the Cabinet's reduction of Northkey's Medicaid reimbursement rate using the "parity factor equivalent" provided for in 907 KAR 1:815 § 3(2)(e) [now recodified as 907 KAR 10:815 §3(2)(e)] is arbitrary and therefore erroneous. The crux of the argument is that the regulation improperly compares psychiatric facilities like

Northkey to acute care hospitals in determining the parity adjustment. Northkey contends—and the Hearing Officer agreed—the 19.5% parity adjustment is not based on any calculation specifically related to Northkey or any free-standing psychiatric hospital. Rather, Northkey argues, the parity factor is based upon a calculation related to acute care hospitals for which a different methodology is applied to establish rates.

. . . .

The Cabinet is correct in that there are no provisions within either 42 USC 10 § 1396, *et seq.*, or KRS 205.560 requiring a 100% Medicaid reimbursement rate. However, this fact does not give the Cabinet *carte blanche* authority to determine reimbursement rate methodologies. While *states* may be given "wide latitude in designing, creating and administering their own respective Medicaid program," the Cabinet does not equate to a "state." It is the state legislature which determines the parameters of a state's Medicaid program. The Cabinet's authority to administer the program, and the extent to which it may do so, are determined by the legislature. In Kentucky, our legislature has determined that Medicaid reimbursement rates "shall be on bases which relate the amount of the payment to the cost of providing the services or supplies." KRS 205.560(2).

. . . .

Therein lies the difficulty with the Cabinet's position. The legislative mandate to the Cabinet is that repayment of Medicaid payments must be "on bases which relate the amount of the payment to the cost of providing the services or supplies." **Nowhere does the Cabinet explain how costs of providing acute care services by non-psychiatric hospitals in any way relate to the costs incurred by psychiatric facilities** . . . .

. . . .

> The Cabinet's position however, as stated by the Cabinet's Secretary in the order reversing the Hearing Officer's Recommended Decision, is that the "parity adjustment" under 907 KAR 1:013 established equivalency between acute-care hospitals and private psychiatric hospitals in recognition that they both pay into the provider tax on their gross revenues and receive distributions based on their cost reports. It is entirely unclear, nevertheless, how these two factors in any significant respect render these two very fundamentally different providers sufficiently similar so as to base reimbursement rates in "parity" with one another. That both providers pay into the provider tax and receive distributions on cost reports in no way represents similarity in the services provided. Thus, . . . **the Cabinet has made no attempt to show how its new methodology relates to Northkey's actual and allowable provider costs.** Therefore, we hold the Cabinet's application of its 19.5% parity factor to Northkey is arbitrary and erroneous.

538 S.W.3d at 302-05 (emphasis added, footnotes and citations omitted).[4]

The Cabinet still has offered no concrete justification for how the parity factor relates to appellees' provider costs. In fact, the Cabinet admits the parity factor is "unrelated to Appellees' costs." Appellee's Brief at 10. Therefore, the parity factor violates KRS 205.560(2).[5]

[4] We reached a similar holding in *Commonwealth, Cabinet for Health and Family Services v. RiverValley Behavioral Health*, 465 S.W.3d 460 (Ky. App. 2014).

[5] Under 907 KAR 10:815 § 3(2)(e), the parity factor is supposed to be "equivalent to aggregate cost coverage established by the DRG reimbursement methodology established in 907 KAR 10:825." This Court cannot locate any current regulations at 907 KAR 10:825.

We also disagree with the Cabinet's argument that calculation/implementation of the parity factor is unreviewable under 907 KAR 10:815 § 21(1), which states that "administrative review shall not be available for . . . the determination of the requirement, or the proportional amount, of any budget neutrality adjustment used in the calculation of the per diem rate." As the hearing officer held, and the Cabinet concedes, there is nothing in the regulation denominating the parity factor as a "budget neutrality adjustment." In any event, administrative review is expressly permitted for erroneously calculated per diem rates, which enabled appellees to seek administrative review. Finally, Section 14 of the Kentucky Constitution guarantees access to the courts to redress grievances, which trumps any arguably contrary administrative regulation.

We now turn to the Cabinet's second main argument—the trial court erred by striking down the 65 percent depreciation rule. Again, we do not write on an entirely blank slate since another panel of this Court has expressed extreme skepticism about the viability of the depreciation rule, albeit in an unpublished opinion. *Cabinet for Health and Family Services v. Regional Healthcare, Inc.*, Appeal No. 2010-CA-001319-MR, 2013 WL 4508205 (Ky. App. Aug. 23, 2013).

907 KAR 10:815 §15 states that the "allowable amount" for depreciation on a "hospital building and fixtures" is 65 percent. The term "hospital" is not defined in the regulation. The trial court found the 65 percent

depreciation rule invalid because it was not related to Appellees' costs of providing care. Though it adamantly contends the trial court's ruling is erroneous, the Cabinet has not cited *anything* to this Court explaining how the administrative regulation arrived at the 65 percent figure or how that depreciation rate relates to appellees' costs of providing care, as is required by KRS 205.560(2).

In *Regional Healthcare*, the Harlan Circuit Court found the depreciation rule invalid because it was not related to providers' costs of providing services. The Cabinet appealed, but then moved to withdraw its appeal because it "discovered" the rule did not apply to psychiatric units of general service-type hospitals, known as distinct part units (DPU). *Id.* at *8.

Over the hospital's objection, we granted the Cabinet's "puzzling" motion to withdraw. *Id.* In so doing, we noted that the Cabinet's newfound position that the 65 percent depreciation rule only applies to freestanding psychiatric hospitals, but not DPUs, does not comport with the language of 907 KAR 10:815 § 15. In *Regional Healthcare*, this Court held that the Cabinet's withdrawal of its appeal regarding the 65 percent rule and thus failure to oppose the circuit court's conclusion that the rule was invalid was "a confession that the circuit court's holding was correct." *Id.* at *9. We find no flaw in that analysis or its application to this case. *See Osborne v. Payne*, 31 S.W.3d 911, 916 (Ky. 2000).

The Cabinet continues to argue that the depreciation rule applies to appellees because they are freestanding psychiatric hospitals. But the Cabinet offers nothing besides self-serving speculation to show why freestanding hospitals should be subject to a different depreciation rate than DPUs. Moreover, the Cabinet has not even cursorily shown how the 65 percent rule is related to appellees' provider care costs. Indeed, the Cabinet admits on page ten of its brief that there is no correlation. For those reasons, we affirm the trial court's conclusion that the 65 percent depreciation rule is invalid.

Finally, we also reject the Cabinet's argument that the parity factor and/or depreciation rule are not severable from the rest of 907 KAR 10:815. Those factors are unrelated to the providers' costs, unlike other sections of the regulation. The Cabinet's argument that withdrawing those factors would cause reimbursement rates to exceed federal limits is speculative at best. The Cabinet may, if necessary, promulgate new regulations which properly base reimbursement rates on providers' costs. In short, the Cabinet has not shown that the regulation would not have been promulgated at all without the parity rate and/or 65 percent depreciation rate. Thus, the clauses are severable. *See, e.g., Martin v. Commonwealth*, 96 S.W.3d 38, 58 (Ky. 2003).

Any other issues raised are moot or without merit.

For the foregoing reasons, the opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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