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19-P-309

Appeals Court

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 58574 vs. SEX OFFENDER REGISTRY BOARD.

No. 19-P-309.

Norfolk. June 5, 2020. - August 28, 2020.

Present: Maldonado, Henry, & Wendlandt, JJ.

Sex Offender. Sex Offender Registration and Community Notification Act. Evidence, Expert opinion, Sex offender. Witness, Expert, Physician. Indigent. Practice, Civil, Sex offender, Judgment on the pleadings. Administrative Law, Proceedings before agency.

Civil action commenced in the Superior Court Department on February 23, 2017.

The case was heard by William F. Sullivan, J., on a motion for judgment on the pleadings.

Edward E. Eliot for the plaintiff.
David L. Chenail for the defendant.

WENDLANDT, J. The indigent petitioner (Doe) requested funds to retain an expert with whom to consult on whether Doe's chronic hepatitis C and treatment with interferon resulted in a physical condition (sexual dysfunction and decreased libido)

that affects his risk to reoffend. In his motion, Doe averred that he had been diagnosed with chronic hepatitis C and had been treated with interferon. He attached to his motion a physician's report documenting his condition and treatment as well as some of his symptoms. Although Doe did not state that he was experiencing sexual dysfunction or lowered libido, he cited scientific publications documenting two studies showing that men with chronic hepatitis C who had been treated with interferon (as Doe had been) were more likely to experience these side effects than a control group without the disease. The hearing examiner (examiner) denied Doe's motion and then determined (following a de novo hearing) that the extent of the mitigating effects of Doe's disease remained unclear. Doe appealed pursuant to G. L. c. 30A, § 14, and G. L. c. 6, § 178M, and a judge of the Superior Court affirmed. Because the examiner abused his discretion in denying Doe's request for funds to retain an expert on the grounds that he did, we vacate the judgment, and a new judgment shall enter vacating the decision of the Sex Offender Registry Board (board) and remanding the matter to the board for further proceedings consistent with this decision.

Background. In May 2002, about one month after being released from prison, Doe raped a woman vaginally, anally, and orally after threatening her with a firearm. He pleaded guilty

to aggravated rape, G. L. c. 265, § 22 (a), assault by means of a dangerous weapon, G. L. c. 265, § 15B (b), and kidnapping, G. L. c. 265, § 26. Prior to release from incarceration,¹ the board notified Doe that he was classified as a level three sex offender, pursuant to G. L. c. 6, § 178K (2) (c). Doe requested a de novo hearing.

In a prehearing motion, Doe requested funds to retain an expert with whom to consult and potentially to provide testimony on the connection between Doe's chronic hepatitis C and his current risk to reoffend and degree of danger.² Through his counsel's affidavit, Doe averred that he was diagnosed with chronic hepatitis C "years ago" and had been treated with interferon. His symptoms of chronic hepatitis C "and residual side effects of his prior interferon treatment" included chronic diarrhea, skin irritations, and lethargy. In support of his motion, he included a June 2016 physician's report, confirming his chronic hepatitis C diagnosis, a period of remission, his treatment with interferon in 2008, his continuing symptoms (including chronic diarrhea and fungal infections), a diagnosis

¹ He was sentenced to from twelve to fifteen years in prison for the aggravated rape charge and from three to five years for the remaining two charges to run concurrently.

² Doe's motion for expert funds did not indicate the specific type of expert he was seeking; at oral argument, Doe clarified that he sought an expert with credentials similar to those who authored the articles attached to his motion.

that the disease had progressed resulting in a level three fibrosis of the liver, and recommending treatment.³

He also cited two scientific studies. He stated that the first study found that "men with chronic [hepatitis C] experienced greater sexual dysfunction . . . in the areas of sex drive, erectile function, ejaculation, sexual problem assessment and overall sexual satisfaction" than a control group of men without the disease.⁴ A second clinical study found a correlation between decreased libido and men with chronic hepatitis C who underwent interferon therapy.⁵ Doe also submitted a booklet in further support of his motion that acknowledged that symptoms of hepatitis C vary, ranging from "mild to severe," and that side effects from interferon treatment may be reduced when a patient ceases the treatment.⁶

³ The Department of Correction denied him the recommended treatment.

⁴ Danoff, Khan, Wan, Hurst, Cohen, Tenner, & Bini, Sexual Dysfunction is Highly Prevalent Among Men with Chronic Hepatitis C Virus Infection and Negatively Impacts Health-Related Quality of Life, 101 Am. J. Gastroenterol. 1235 (2006). Doe described the study as showing "a strong association between sexual dysfunction and poor health related quality of life issues[,] such as physical functioning, . . . physical role limitation, . . . [and] fatigue."

⁵ Kraus, Schafer, Bentink, Scheurlen, Weissbrich, Al-Taie, & Seufert, Sexual Dysfunction in Males with Chronic Hepatitis C and Antiviral Therapy: Interferon-Induced Functional Androgen Deficiency or Depression?, 185 J. Endocrinol. 345 (2005).

Doe stopped taking interferon approximately seven years before the filing of the motion.

Doe contended that he needed to consult with an expert on the issue whether, in his particular case, there was a nexus between his disease and prior treatment and sexual dysfunction and decreased libido relevant to at least two of the board's regulatory factors -- factor thirty (age) and factor thirty-one (physical condition). 803 Code Mass. Regs. § 1.33(30), (31) (2016) (regulations). Doe did not aver that he presently suffered from any of the sexual dysfunction side effects mentioned in the studies.

The examiner denied the motion. He reasoned that the updated January 2016 regulations "cover[ed] the issue of physical condition," and as such he was "imbued with the expertise of the [b]oard's regulations in making a determination regarding level of risk of reoffense and degree of dangerousness posed to the public." He explained that factor thirty-one (pursuant to which an examiner must consider a sex offender's physical condition) covered Doe's history of chronic hepatitis C, and because Doe already had documentation of his disease (in the form of the physician's report he had submitted in connection with his motion), no additional expertise was

⁶ G. Taylor, *Hepatitis C: Common Disabling Symptoms and Treatment Side Effects*, at 4, 8.

required to assess the effects of Doe's chronic hepatitis C on his risk of reoffense and level of dangerousness. The examiner also noted that he would assess Doe's age in connection with factor thirty, and that no additional expert evidence was required because he would give "due weight" to this factor.

After a de novo hearing in January 2017, the examiner agreed with the board's level three classification recommendation. At the hearing, Doe testified that he did not know if he had sexual dysfunction. He stated, "I'm locked up in prison. . . . I don't mess with homosexuals or nothing like that so I couldn't even answer that question." The examiner found Doe's testimony in this regard "somewhat disingenuous." The examiner gave "some mitigating consideration" to the physical conditions stemming from Doe's chronic hepatitis C diagnosis (fatigue, depression, chronic diarrhea, and skin irritations), which were documented by the 2016 physician's report; however, he did not give any weight to any potential sexual dysfunction or decreased libido stemming from Doe's disease and treatment. The examiner acknowledged that "the full extent of [the] effects" of Doe's illness and treatment "remain unclear." Pursuant to G. L. c. 6, § 178M, and G. L. c. 30A, § 14, Doe appealed to the Superior Court, which affirmed the level three classification and the examiner's denial of Doe's motion for expert funds. This appeal followed.

Discussion. An agency decision should be set aside only if a court determines that the decision was "(a) [i]n violation of constitutional provisions; or (b) [i]n excess of the statutory authority or jurisdiction of the agency; or (c) [b]ased upon an error of law; or (d) [m]ade upon unlawful procedure; or (e) [u]nsupported by substantial evidence; or (f) [u]nwarranted by facts found by the court on the record as submitted . . .; or (g) [a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." G. L. c. 30A, § 14 (7). "[W]e give due weight to the experience, technical competence, and specialized knowledge of the agency" (quotation omitted). Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643, 649 (2019).

We review the examiner's decision to deny a motion for expert funds for an abuse of discretion. See Doe, Sex Offender Registry Bd. No. 89230 v. Sex Offender Registry Bd., 452 Mass. 764, 774 (2008) (Doe No. 89230) ("the board has discretion to grant funds to an indigent sex offender for an expert witness or report . . ."). "[A] . . . discretionary decision constitutes an abuse of discretion where we conclude the [examiner] made 'a clear error of judgment in weighing' the factors relevant to the decision . . ., such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). "[I]t is

plainly not an abuse of discretion simply because a reviewing court would have reached a different result." Id.

"[I]n moving for expert witness funds, the burden [is] on the sex offender to identify and articulate the reason or reasons, connected to a condition or circumstance special to him, that he needs to retain a particular type of expert. A general motion for funds to retain an expert to provide an opinion on the sex offender's risk of reoffense, without more, would appear to be insufficient." Doe No. 89230, 452 Mass. at 775. Here, Doe's motion was not a generic motion for funds. Instead, it was tailored to the specifics of Doe's chronic hepatitis C. The 2016 physician's report provided support for such condition, as well as setting forth some of Doe's symptoms and his treatment with interferon. The two scientific articles showed a correlation between Doe's particular condition (chronic hepatitis C and interferon treatment) and lowered libido and sexual dysfunction. Doe did not, however, state in the motion or supporting affidavit that he presently was experiencing these symptoms.

The examiner's decision to deny funds rested on a fallacy -- namely, that he was "imbued" with expertise by virtue of the fact that the regulations require the examiner to consider a sex offender's physical condition. Nothing in the regulations suggests an imbedded consideration of the nexus between chronic

hepatitis C and risk to reoffend.⁷ Moreover, neither the correlation between the disease and sexual dysfunction nor the nexus between interferon and lowered libido is within the ken of common knowledge and experience. See, e.g., Doe, Sex Offender Registry Bd. No. 205614 v. Sex Offender Registry Bd., 466 Mass. 594, 610 (2013) (Doe No. 205614) (expert evidence on female sexual recidivism required as "examiner would not otherwise have competent evidence before him to assess fully Doe's risk of reoffense"); Doe, Sex Offender Registry Bd. No. 151564 v. Sex Offender Registry Bd., 85 Mass. App. Ct. 1, 10 (2014) (refusal to consider studies on effect of age on recidivism rates was arbitrary and capricious where examiner used her own unguided interpretation of studies). See also Doe, Sex Offender Registry Board No. 234076 v. Sex Offender Registry Bd., 484 Mass. 666, 673 (2020) ("Expert evidence is relevant to a board hearing, and therefore admissible, when it would assist the hearing examiner

⁷ By contrast, the updated regulations specifically address the impact of age on a sex offender's classification. Accordingly, the examiner did not abuse his discretion in denying Doe's request for funds in this regard. See, e.g., Doe, Sex Offender Registry Bd. No. 234076 v. Sex Offender Registry Bd., 484 Mass. 666, 670 (2020) ("The hearing examiner accordingly has discretion to deny expert funds to indigent sex offenders who offer expert opinion on factors that the board's regulations already require the hearing examiner to consider"); Doe, Sex Offender Registry Bd. No. 68549 v. Sex Offender Registry Bd., 470 Mass. 102, 113-114 (2014) (no abuse of discretion to disregard Doe's experts where guidelines explicitly required consideration of Doe's youth, and examiner did so).

in interpreting evidence that lies outside common experience"). Both correlations, however, might well have had a bearing on Doe's classification, at least in the view of the examiner, who specifically stated that the record was "unclear" as to the full mitigating effects of Doe's chronic hepatitis C. Indeed, the board does not argue to the contrary.

On appeal, the board maintains that the examiner correctly denied Doe's motion because Doe did not "conclusively establish" that his illness and treatment had an effect on his current risk of reoffense or level of dangerousness. Of course, if Doe could "conclusively establish" such an effect without an expert, he would not need the sought funds. Factor thirty-one, physical condition, is one of three regulatory factors that expressly appears "to concern issues for which expert evidence presented on behalf of the sex offender may be most relevant and material."⁸ Doe No. 89230, 452 Mass. at 775. See Doe No. 205614, 466 Mass. at 604 ("The ability to consider other useful information not specifically contemplated by the guidelines is an important safety valve protecting a sex offender's due

⁸ Doe contends that due process and equal protection require the board to grant an indigent sex offender funds for an expert relating to factors one (mental abnormality), thirty-one (physical condition), and thirty-five (psychological profile). 803 Code Mass. Regs. § 1.33(1), (31), (35) (2016). This argument fails in view of the Supreme Judicial Court's holding that the decision to allow funds is not mandatory, but discretionary. See Doe No. 89230, 452 Mass. at 770.

process rights"). The examiner appeared to believe that the physician's report (which Doe had used to support his motion) provided sufficient documentation to establish the applicability of the physical condition factor. Again, the examiner erred. The physician's report did not "[p]rovide a detailed description" of the physical limitations -- lowered libido and sexual dysfunction -- that Doe was seeking funds to establish. 803 Code Mass. Regs. § 1.33(31)(a)(3).

The board alternatively contends that the examiner properly denied Doe's motion because Doe did not allege that, in fact, he was experiencing decreased libido or any other sexual dysfunction.⁹ This was not a basis relied on by the examiner to deny Doe's motion. "While we can conduct a meaningful review of 'a decision of less than ideal clarity if the agency's path may reasonably be discerned,' we will not 'supply a reasoned basis for the agency's action that the agency itself has not given.'" Costello v. Department of Pub. Utils., 391 Mass. 527, 535-536 (1984), quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285-286 (1974). See Doe, Sex Offender Registry Bd. No. 11204 v. Sex Offender Registry Bd., 97 Mass. App. Ct. 564, 576 (2020) (remanding for examiner to consider

⁹ Doe's statement at the de novo hearing that he did not know whether he suffered from sexual dysfunction, which was made after Doe was denied funds for an expert, could have had no bearing on the examiner's decision.

board's alternative argument for affirmance made for first time on appeal). "The basic rule . . . is clear: An agency must defend its actions based on the reasons it gave when it acted."¹⁰ Department of Homeland Sec. v. Regents of the Univ. of Cal., U.S. Supreme Ct., No. 18-587, slip op. at 17 (June 18, 2020) (rejecting post hoc rationale for agency action because it is contrary to agency accountability and undermines confidence that reasons given are not simply convenient litigating positions). Here, despite the position urged by the board on appeal, the examiner did not rely on Doe's silence on the issue whether he was experiencing sexual dysfunction in denying the motion. This may have been because the examiner believed his stated reasons were sufficient, he did not believe Doe's silence mattered, or for another reason. We decline the board's invitation to speculate. See, e.g., NSTAR Elec. Co. v. Department of Pub. Utils., 462 Mass. 381, 387 (2012) (unable to discern legal reasoning supporting department's orders, court declined to

¹⁰ The decision whether to grant funds was the examiner's to make in his discretion, see Doe No. 89230, 452 Mass. at 774; it was not a matter of law as to which we may affirm on an alternative ground not relied on by the examiner so long as the ground is supported by substantial evidence as found by the agency. Contrast Franklin Office Park Realty Corp. v. Commissioner of Dep't of Env'tl. Protection, 466 Mass. 454, 466 (2013) ("when an agency's decision is based on an error of law, a reviewing court may choose to leave in place the overall disposition of a case, but on different grounds than those relied upon by the agency").

speculate); Gauthier v. Director of the Office of Medicaid, 80 Mass. App. Ct. 777, 789-790 & n.12 (2011).

The reasons actually relied on by the examiner to deny Doe's motion were unsupportable. On remand, the examiner shall allow Doe's motion or, alternatively, he may reconsider his decision consistent with this opinion. Of course, if the examiner determines to revisit his decision, the board may present any argument in opposition (including the one it marshals on appeal) and, in such event, Doe may respond. See Moe v. Sex Offender Registry Bd., 444 Mass. 1009, 1009 (2005) ("In the absence of statutory limitations, administrative agencies generally retain inherent authority to reconsider their decisions").

Conclusion. We vacate the judgment affirming the board's decision classifying Doe as a level three sex offender, and a new judgment shall enter vacating the board's decision and remanding this matter to the board for further proceedings consistent with this opinion.

So ordered.