NO. COA12-57
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

NOVANT HEALTH, INC., FORSYTH MEMORIAL HOSPITAL, INC. d/b/a FORSYTH MEDICAL CENTER and MEDICAL PARK HOSPITAL, INC.,

Petitioners,

v.

North Carolina Department of Health and Human Services
No. 10 DHR 3788

N. C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION,

Respondent,

and

NORTH CAROLINA BAPTIST HOSPITAL,

Respondent-Intervenor.

Appeal by petitioners from final agency decision entered 18 July 2011 by the North Carolina Department of Health and Human Services, Division of Health Service Regulation. Heard in the Court of Appeals 11 September 2012.

Nelson Mullins Riley & Scarborough LLP, by Noah H. Huffstetler, III, Denise M. Gunter, and Elizabeth B. Frock for petitioner-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell for respondent-appellee North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section.

Bode, Call & Stroupe, LLP, by S. Todd Hemphill and Matthew A. Fisher for respondent-intervenor-appellee North Carolina Baptist Hospital.

STEELMAN, Judge.

The agency did not err in holding that the petitioner failed to show substantial prejudice as a result of the agency's award of a certificate of need to an academic medical center teaching hospital.

I. Factual and Procedural History

On 15 January 2010, North Carolina Baptist Hospital ("NCBH") filed an application for a certificate of need ("CON") with the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section ("DHHS"). The application sought authorization for NCBH to construct a new ambulatory surgical facility in Forsyth County. This facility would house eight new operating rooms ("ORs"), two procedure rooms, one robotic training room, and one simulation OR. Seven of the ORs would be new, and one would be relocated from an existing OR. The proposed facility would be located on the NCBH campus in Winston-Salem in a new building.

The application was made pursuant to Policy AC-3 of the State Medical Facilities Plan ("SMFP"), which sets forth special criteria for the evaluation of a CON application made by an academic medical center teaching hospital ("AMC"), such as NCBH. By letter dated 10 June 2010, DHHS approved the NCBH CON application. At the time of the application, there was a surplus of 5.52 ORs in Forsyth County. State Medical Facilities Plan, Table 6B: Projected Operating Room Need for 2012, North Carolina Department of Health and Human Services (2010).

On 9 July 2010, petitioners Novant Health, Inc., doing business as Forsyth Medical Center and Medical Park Hospital, Inc. (collectively "Novant") filed a Petition for Contested Case Hearing with the Office of Administrative Hearings ("OAH") contesting the approval of NCBH's application. NCBH moved to intervene, and that motion was granted.

NCBH and Novant each filed motions for summary judgment. Administrative Law Judge ("ALJ") Donald W. Overby heard oral arguments on the summary judgment motions on 10 January 2011. The parties stipulated that there were no genuine issues of material fact regarding NCBH's compliance with N.C. Gen. Stat. §§ 131E-183(a)(1) and (a)(6) ("Criterion 1" and "Criterion 6," respectively). However, the parties stipulated that there were

genuine issues of material fact regarding N.C. Gen. Stat. § 131E-183(a)(3) ("Criterion 3") and whether Novant was substantially prejudiced by the decision to grant the application, as required by N.C. Gen. Stat. § 150B-23(a). A contested case hearing was held on these issues.

On 5 April 2011, ALJ Overby granted summary judgment in favor of Novant with respect to Criterion 1 and Criterion 6, and in favor of NCBH with respect to the conformity of NCBH's application with the agency's rules. ALJ Overby also ruled that NCBH conformed with Criterion 3 and that Novant did not show substantial prejudice. ALJ Overby's Recommended Decision approved the issuance of the CON, except where it conflicted with the summary judgment order.

On 18 July 2011, DHHS issued a final agency decision ("FAD") pursuant to N.C. Gen. Stat. §§ 150B-34 and 36, in which it reversed ALJ Overby's grant of summary judgment to Novant with respect to Criterion 1 and Criterion 6, granted summary judgment in favor of NCBH with respect to the agency rules, and adopted the decision with respect to Criterion 3 and substantial prejudice.[1]

[1] This procedure was amended by N.C. Gen. Stat. § 131E-188(a) (2011), effective 01 January 2012. Under these amendments, an appeal of a decision by DHHS to grant or not grant a CON

Novant appeals.

II. Prejudice

In its second argument, Novant contends that the FAD erred in holding that Novant did not suffer prejudice as a result of the approval of NCBH's CON application. We disagree.

A. Standard of Review

> N.C. Gen. Stat. § 131E-183(a) charges the Agency with reviewing all CON applications utilizing a series of criteria set forth in the statute. The application must either be consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued. A certificate of need may not be granted which would allow more medical facilities or equipment than are needed to serve the public. Each CON application must conform to all applicable review criteria or the CON will not be granted. The burden rests with the applicant to demonstrate that the CON review criteria are met.

Parkway Urology, P.A. v. N.C. Dept. of Health and Human Services, 205 N.C. App. 529, 534, 696 S.E.2d 187, 191-92 (2010), *disc. rev. denied*, 365 N.C. 78, 705 S.E.2d 753 (2011) (quoting *Good Hope Health Sys., L.L.C. v. N.C. Dep't of Health & Human Servs.*, 189 N.C. App. 534, 549, 659 S.E.2d 456, 466 (2008)).

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application is heard by an ALJ, who enters a final decision. The case will not go back before the agency for entry of an FAD. Appeal from the decision of the ALJ is directly to this Court. N.C. Gen. Stat. § 131E-188(b). This amendment is not applicable to the instant case.

For a CON determination to be reversed, the appellant must show that its substantial rights have been prejudiced because the decision, findings, or conclusions are:

> (1) In violation of constitutional provisions;
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> (2) In excess of the statutory authority or jurisdiction of the agency;
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> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

Id. at 534, 696 S.E.2d at 192 (quoting ***Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.***, 171 N.C. App. 734, 739, 615 S.E.2d 81, 84 (2005) (quoting N.C. Gen. Stat. § 150B-51(b) (1999))). "The first four grounds for reversing or modifying an agency's decision . . . are law-based inquiries. On the other hand, [t]he final two grounds . . . involve fact-based inquiries. In cases appealed from administrative agencies, [q]uestions of law receive ***de novo*** review, whereas fact-intensive issues such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test." *Id.* at 535, 696 S.E.2d at 192 (quoting ***N.C. Dep't of***

Revenue v. Bill Davis Racing, 201 N.C. App. 35, 42, 684 S.E.2d 914, 920 (2009)).

> In applying the whole record test, the reviewing court is required to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. We should not replace the agency's judgment as between two reasonably conflicting views, even if we might have reached a different result if the matter were before us ***de novo***. While the record may contain evidence contrary to the findings of the agency, this Court may not substitute its judgment for that of the agency.

Id. (quoting ***Dialysis Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.***, 137 N.C. App. 638, 646, 529 S.E.2d 257, 261 (2000)).

B. Analysis

A party seeking to show prejudice must "provide specific evidence of harm resulting from the award of the CON to [a competitor] that went beyond any harm that necessarily resulted from additional . . . competition[.]" *Id.* at 539, 696 S.E.2d at 195. If a petitioner cannot show such prejudice, "[W]e do not reach [petitioner]'s remaining assignments of error regarding [petitioner]'s own motions for summary judgment not reached by the final agency decision." ***Presbyterian Hosp. v. N.C. Dep't of***

Health and Human Servs., 177 N.C. App. 780, 785, 630 S.E.2d 213, 216 (2006).

The sufficiency of a party's showing of prejudice is determined as a matter of law. *See Hospice at Greensboro, Inc. v. N.C. Dep't of Health and Human Servs.*, 185 N.C. App. 1, 16, 647 S.E.2d 651, 661 (2007) (holding that "the issuance of a 'No Review' letter . . . substantially prejudices a licensed, pre-existing competing health service provider as a matter of law"). In cases appealed from administrative agencies, questions of law receive *de novo* review. *Parkway Urology*, 205 N.C. App. at 535, 696 S.E.2d at 192 (quoting *Bill Davis Racing*, 201 N.C. App. at 42, 684 S.E.2d at 920).

DHHS is authorized by statute to establish policies and rules for project review. N.C. Gen. Stat. § 131E-177 (2010). It promulgates these rules under the SMFP. Under Policy AC-3 of the SMFP, an AMC such as NCBH is "[exempt] from the provisions of need determinations of the North Carolina State Medical Facilities Plan" provided that the AMC can demonstrate that the expansion is necessary, and that its need "cannot be achieved effectively at any non-Academic Medical Center Teaching Hospital provider which currently offers the service for which the exemption is requested and which is within 20 miles of the

Academic Medical Center Teaching Hospital." State Medical Facilities Plan, Policy AC-3, North Carolina Department of Health and Human Services (2010). This policy permits an AMC to develop new facilities, even where a non-AMC hospital could not.

In the instant case, Novant does not challenge the authority of the General Assembly to delegate rule-making authority to DHHS, nor the authority of DHHS to promulgate the SMFP. Instead, Novant contends that Policy AC-3 gives NCBH an unfair competitive advantage by allowing NCBH to obtain new ORs that would not otherwise be permitted under statute. However, DHHS, through the SMFP, has expressly authorized AMCs such as NCBH to obtain new ORs which might not otherwise be authorized. Novant's arguments concerning this provision should be addressed to the General Assembly and not to the courts.

The remainder of Novant's contention is that as a result of NCBH receiving CON approval, Novant will suffer harm in the market due to NCBH's increased ability to provide health care services. In *Parkway Urology*, we held that a mere competitive advantage is an insufficient basis upon which to argue prejudice. *Id.* at 539, 696 S.E.2d at 195. Novant has failed to show that its harm rises above that posed by mere competition, and thus it has failed to demonstrate substantial prejudice.

This argument is without merit.

III. Other Arguments

Because Novant cannot demonstrate prejudice, we need not address Novant's other arguments. *Presbyterian Hosp.*, 177 N.C. App. at 785, 630 S.E.2d at 216.

IV. Conclusion

In order to challenge the FAD awarding a CON to NCBH, Novant had to establish that it suffered prejudice "that went beyond any harm that necessarily resulted from additional . . . competition[.]" *Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 195. Because it has failed to do so, we need not address its additional arguments. The FAD is affirmed.

AFFIRMED.

Judges MCGEE and ERVIN concur.

Report per Rule 30(e).