NO. COA13-166
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

POWELL'S MEDICAL FACILITY and
EDDIE N. POWELL, M.D.,
Petitioners

v. Sampson County
No. 12 CVS 572

NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
DIVISION OF MEDICAL ASSISTANCE,
Respondent

Appeal by petitioners from order entered 18 September 2012 by Judge William R. Pittman in Sampson County Superior Court. Heard in the Court of Appeals 15 August 2013.

The Charleston Group, by R. Jonathan Charleston, Michael R. Porter and Jose A. Coker, for petitioner-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Belinda A. Smith, for respondent-appellee.

CALABRIA, Judge.

Powell's Medical Facility ("PMF") and Eddie N. Powell, M.D. ("Dr. Powell") (collectively "petitioners"), appeal from an order upholding the North Carolina Department of Health and Human Services ("DHHS"), Division of Medical Assistance's

("DMA") (collectively "respondent"), Final Agency Decision ("FAD") that Dr. Powell's Medicaid enrollment was properly terminated. We affirm.

I. Background

Dr. Powell was licensed as a physician in North Carolina in 1979 and has been a Medicaid provider since 1980. DHHS is the agency that administers the State's Medicaid program, while DMA, a division of DHHS, enrolls and monitors Medicaid providers. Computer Sciences Corporation ("CSC"), a DMA contractor, verifies the providers' credentials.

In 1991, Dr. Powell was convicted of the felonies of incest and taking indecent liberties with a minor after his stepdaughter accused him of having sexual relations with her. This Court upheld his convictions on appeal on 7 September 1993. Dr. Powell's license to practice medicine was revoked from 27 September 1993 through 15 October 1993, after which he resumed practicing medicine and was subsequently reinstated as a Medicaid provider. Although his stepdaughter attempted to retract her accusations and petitioned at least one North Carolina governor to overturn his convictions, Dr. Powell remains a convicted sex offender.

In 2009, CSC began to re-verify all current Medicaid providers to ensure that they met the criteria for participation in the program. In August 2009, Dr. Powell submitted a verification packet and later he and a partner submitted a new application seeking a group practice number. Both Participation Agreements included clauses regarding the agency's authority to terminate Dr. Powell's program enrollment without 30 days written notice for convictions of certain offenses, including crimes of moral turpitude.

Margaret Kimberly Carter ("Carter"), a DMA Provider Enrollment Supervisor, reviewed the results of Dr. Powell's background check and discovered Dr. Powell did not disclose his criminal history. She conferred with her manager and suggested termination, a recommendation that he approved. As a result, DMA terminated all billing numbers associated with Dr. Powell, effectively ending his participation in the Medicaid program. DMA notified Dr. Powell of the results of the background check and his termination in two letters, both dated 23 November 2010. The letters were identical except for the provider numbers. Both letters explained to Dr. Powell the grounds for terminating a provider who failed to meet the conditions of participation. Specifically, if a provider was convicted of a criminal offense

or made "any misstatement ... or omission" while submitting the provider application, DMA had the authority to terminate a provider without notice.

Petitioners sought a Reconsideration Review of DMA's decision, but the decision was upheld. On 10 February 2011, petitioners filed a contested case hearing with the Office of Administrative Hearings. After a hearing, Administrative Law Judge Donald W. Overby ("ALJ") found that Dr. Powell had an affirmative duty to disclose his convictions and that he failed to do so. The ALJ also found that DMA's decision to terminate Dr. Powell's enrollment was arbitrary and capricious. The ALJ ordered Dr. Powell suspended from the Medicaid program for a period of one year for his failure to disclose the convictions. The case was returned to respondent and the FAD held that Dr. Powell's Medicaid enrollment was properly terminated. Petitioners sought judicial review of the FAD in Sampson County Superior Court. The trial court denied the petition and upheld respondent's FAD. Petitioners appeal.

II. Standard of Review

"A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court ...." N.C. Gen. Stat. § 150B-52 (2011). "An

appellate court's review proceeds in two steps: (1) examining whether the trial court applied the correct standard of review and (2) whether the trial court's review was proper." *City of Rockingham v. N.C. Dep't of Env't and Natural Res., Div. of Water Quality*, __ N.C. App. __, __, 736 S.E.2d 764, 767 (2012). When a court reviews a final agency decision, "in which an administrative law judge made a decision ... and the agency does not adopt the administrative law judge's decision, the court shall review the official record, de novo, and .... shall not give deference to any prior decision made in the case[.]" N.C. Gen. Stat. § 150B-51(c)(2009).[1] In conducting its review, the trial court "may adopt the [ALJ's] decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency ... and may take any other action allowed by law." *Id.*

In the instant case, the agency did not adopt the ALJ's decision, therefore the trial court was required to conduct a *de novo* review of the evidence. N.C. Gen. Stat. § 150B-51(c)(2009). As the order reflects, "[b]ecause respondent

[1] We note that N.C. Gen. Stat. § 150B-51 was modified by Session Law in 2011. *See* 2011 N.C. Sess. Laws ch. 398, sec. 27 (2011). However, the modifications became effective 1 January 2012 and only apply to contested cases commenced on or after that date. Since petitioners commenced their contested case on 9 February 2011, the trial court's review is governed by the 2009 version of N.C. Gen. Stat. § 150B-51. *See* N.C. Gen. Stat. § 150B-23 (2011).

declined to adopt [the ALJ's] decision in full, the [c]ourt reviews the final decision of the agency *de novo*." Therefore, we must determine whether the trial court properly applied this standard. *City of Rockingham*, __ N.C. App. at __, 736 S.E.2d at 767.

III. Findings of Fact

Petitioners argue that several of the trial court's findings of fact were not supported by substantial evidence. We disagree.

"In cases reviewed under G.S. 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence." N.C. Gen. Stat. § 150B-52 (2011). "Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Stark v. N.C. Dep't of Env't and Natural Res., Div. of Land Res.*, __ N.C. App. __, __, 736 S.E.2d 553, 558 (2012) (citation omitted).

In the instant case, petitioners contend the following findings of fact by the trial court were not supported by substantial evidence:

> 11) Petitioner did not provide any information on the August 2009 verification submission to CSC concerning his criminal history.

> 12) Dr. Powell submitted a second verification application in September 2010 which also contained no admission of his prior convictions.
>
> ...
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> 16) Petitioner presented no evidence at the hearing below to demonstrate that he disclosed his convictions to the North Carolina Medicaid program at any time.
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> 17) Prior to the 2009 background check, the only documentation concerning Petitioner's criminal history in his DMA provider enrollment record is a computer printout which refers only to the action taken by the Medical Board, and contains a handwritten notation dated April 29, 1994 that unspecified "charges were dropped."
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> 18) The first time Respondent became aware of Petitioner's criminal convictions was when CSC performed the criminal background check in response to the P&S Med application.
>
> 19) As a result of the discovery of Petitioner's convictions, his failures to disclose and his false representations, Respondent terminated all billing numbers associated with Petitioner.

Petitioners believe the reason findings eleven and twelve are not supported by substantial evidence is because they are "based upon the premise that Dr. Powell was asked to provide this information to DMA ...." Petitioners do not argue that Dr. Powell actually provided this information, only that he was not

required to do so. Since petitioners did not claim that the findings were factually incorrect, this argument is without merit.

The reason petitioners argue findings sixteen, seventeen and eighteen are not supported by substantial evidence is because Carter testified that DMA had "been aware of Dr. Powell's convictions since as far back as 1993 or 1994." This statement is only partially accurate. Carter later amended her earlier testimony and testified that DMA had only been previously aware of Dr. Powell's *charges*, not his convictions. Thus, the trial court's findings of fact are supported by the evidence.

Petitioners contend finding of fact nineteen is not supported by the evidence because "[t]he only evidence below was that the **sole** basis for DMA's decision to terminate Dr. Powell's participation in Medicaid is the **mere existence** of Dr. Powell's criminal conviction." Petitioners are mistaken. Carter affirmed on recross examination that Dr. Powell's "termination was based on the failure to disclose that conviction in the P&S Med application, as well as the conviction itself[.]" In addition, the DMA letters to Dr. Powell terminating his Medicaid participation indicated the reason for his termination was his

failure to disclose his convictions on both applications that he submitted. Therefore, despite petitioners' contentions, there was substantial evidence in the record supporting the trial court's finding that Dr. Powell's failure to disclose, as well as the conviction itself, gave DMA the authority to terminate his participation as a Medicaid provider without the requisite written notice.

Since there was substantial evidence to support all the trial court's findings, we uphold these findings. N.C. Gen. Stat. § 150B-52 (2012). Petitioners' arguments are without merit.

IV. Conclusions of Law

Petitioners also argue that the trial court erred by entering conclusions of law three through ten and thirteen through fifteen. Specifically, petitioners claim that the trial court's conclusions of law were in error because there was not substantial evidence to support the findings of fact, and thus the findings could not have supported the conclusions. However, since we have determined that the findings of fact were supported by substantial evidence, petitioners' argument fails.

V. Exercise of Discretion

Petitioners also argue that the trial court erred by upholding the FAD since DMA was required to exercise discretion, but failed to do so when Dr. Powell's Medicaid participation was terminated. We disagree.

A party may commence a contested case "by paying a fee ... and by filing a petition with the Office of Administrative Hearings ...." N.C. Gen. Stat. § 150B-23(a) (2011). If the petition is

> filed by a party other than an agency, [it] shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property ... or has otherwise substantially prejudiced the petitioner's rights and that the agency:
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> (1) Exceeded its authority or jurisdiction;
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> (2) Acted erroneously;
>
> (3) Failed to use proper procedure;
>
> (4) Acted arbitrarily or capriciously; or
>
> (5) Failed to act as required by law or rule.

Id. When a petitioner challenges an agency's decision, this Court has held that "the burden of proof rests on the petitioner." *Overcash v. N.C. Dep't of Env't and Natural Res., Div. of Waste Mgmt.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447 (2006).

In the instant case, according to the language in the Medicaid Participation Agreement: "the Department may summarily terminate without giving 30 days written notice . . . [when the provider] has been convicted of [a] . . . crime of moral turpitude[.]" After CSC informed DMA of Dr. Powell's convictions, and his failure to disclose those convictions, his Medicaid participation was terminated. Petitioners challenged the agency's decision and the ALJ found, *inter alia*, that DMA was required, but failed, to exercise discretion when terminating Dr. Powell's Medicaid participation.

DMA adopted in part and rejected in part the ALJ's decision and issued a FAD. DMA held, *inter alia*, that petitioners "failed to show that Respondent did not exercise any discretion in making the decision to terminate Petitioner's participation in the North Carolina Medicaid program due to Petitioner's felony convictions and failure to disclose." Specifically, the FAD recognized that petitioners had the burden of proof in the hearing, that they only offered one witness, Carter, and that Carter was incapable of testifying about "the type or level of review that was conducted by her supervisor." Petitioners requested judicial review. The trial court denied the petition and upheld the FAD.

The trial court concluded that "[t]here is ample evidence in the record to support the agency's position on the enumerated findings of fact and conclusions of law" and that "Carter's testimony constitutes substantial evidence to support the final agency decision." We agree. Carter testified that after discovering Dr. Powell's convictions, she made a recommendation regarding his termination. Carter's testimony supported the FAD's finding that petitioners "did not present any evidence that Ms. Carter's supervisor failed to review the file or give it due consideration...." Carter also testified regarding DMA's discretion when making the decision.

Petitioners are correct that Carter's testimony indicated that *she and others at her level* did not have the discretion to make exceptions and permit a participant who had a felony conviction to continue in the program. Carter's testimony also indicated that decision makers above her had discretion to make exceptions and permit participation for some individuals. However, petitioners had the burden of proof at the hearing. Carter's testimony provides evidence to support the FAD's findings and conclusions that petitioners failed to meet their burden of proving that DMA did not exercise any discretion in making the decision to terminate Dr. Powell's participation in

the Medicaid program. Therefore, the trial court did not err by concluding the FAD was "based upon substantial admissible evidence of record, [wa]s supported by the preponderance of the admissible evidence in view of the entire record, and ha[d] a rational basis in the evidence."

VI. Judicial Admission

Petitioners also argue that "DMA judicially admitted that DMA improperly delegated its decision making authority to a private corporation" because in a Motion to Quash filed with the court below, DMA indicated that CSC actually terminated petitioners' contract. We disagree.

It is well established in North Carolina that

> a judicial admission is a formal concession made by a party (usually through counsel) in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute.... Such an admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence. It is binding in every sense.

Jones v. Durham Anesthesia Assocs., P.A., 185 N.C. App. 504, 509, 648 S.E.2d 531, 535 (2007) (citation omitted). "[W]ithdrawn pleadings in the same case ... do not amount to judicial admission which are conclusive as to the matters contained therein." *Outer Banks Contr'rs, Inc. v. Forbes*, 302

N.C. 599, 606, 276 S.E.2d 375, 380 (1981). Rather, "[s]uch pleadings may be utilized by a party to litigation as evidential admissions in precisely the same way as if it had been embodied in some other form." *Id.*

In the instant case, a Motion to Quash the petitioners' subpoena of the DMA Director filed by respondent had contradictory statements. In one section of the motion, respondent indicated that CSC made the decision to terminate Dr. Powell's Medicaid participation. In another section of the motion, the DMA Director "did not participate in the routine decision by the DMA Provider Enrollment section to terminate a provider based on a conviction for a crime of moral turpitude." Subsequently, the Motion to Quash was withdrawn.

Considering that the document itself is contradictory, it is clear that respondent's statement was not "for the purpose of withdrawing a particular fact from the realm of dispute[.]" *Jones*, 185 N.C. App. at 509, 648 S.E.2d at 535. Furthermore, respondent's Motion to Quash was withdrawn, and therefore does not amount to a judicial admission. *Outer Banks*, 302 N.C. at 606, 276 S.E.2d at 380. Therefore, petitioners' argument is without merit.

VII. Property Right

Petitioners further argue that the trial court erred by concluding that Dr. Powell's enrollment in the Medicaid program was terminable at will. Specifically, Dr. Powell contends that he had a property interest in the contract, and therefore, DMA was required to exercise discretion in deciding whether to terminate his Medicaid participation. Even assuming, *arguendo*, that Dr. Powell's enrollment was not terminable at will, we have already determined that there was substantial evidence to support the FAD holding that respondent exercised discretion before terminating Dr. Powell's Medicaid participation. Therefore, it is unnecessary to reach the merits of petitioners' argument.

VIII. Conclusion

The trial court's findings of fact were supported by substantial evidence. Therefore, they will be upheld. N.C. Gen. Stat. § 150B-52 (2012). Those findings supported the conclusions of law. Furthermore, the trial court properly concluded that there was substantial evidence to support the FAD's holding that respondent exercised discretion in terminating Dr. Powell's Medicaid participation number. In addition, respondent's misstatement in a withdrawn Motion to Quash does not amount to a judicial admission. Ultimately, we

conclude that the trial court applied the correct standard of review and its review was proper. Therefore, we affirm the trial court's decision. *City of Rockingham*, __ N.C. App. at __, 736 S.E.2d at 767.

Affirmed.

Judges STROUD and DILLON concur.

Report per Rule 30(e).