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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1175

Filed: 18 July 2017

Durham County, No. 16 CVS 3036

ANNETTE BAKER, Ph.D., Plaintiff,

v.

THE NORTH CAROLINA PSYCHOLOGY BOARD, Defendant.

Appeal by defendant from order entered 29 July 2016 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 3 May 2017.

Stevens Martin Vaughn & Tadych, PLLC, by C. Amanda Martin and Michael J. Tadych, for plaintiff-appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Sondra C. Panico, for defendant-appellant.

DIETZ, Judge.

This case involves a challenge by Dr. Annette Baker, a licensed psychologist, to professional discipline imposed by the North Carolina Psychology Board over her handling of a court-appointed child custody evaluation.

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Dr. Baker met with the parents and children several times in the months immediately after the court appointed her, but then ceased communicating with the parents or the father's attorney. Nearly a year went by in which the parties tried repeatedly and unsuccessfully to contact Dr. Baker to check on the progress of her evaluation. Ultimately, it took Dr. Baker more than two years to complete the evaluation. In the meantime, the parties resolved their custody dispute, but the father believed that Dr. Baker's failure to communicate with him and with his attorney caused stress and anxiety to both the parents and their children, added to the pain of litigating the couple's divisive custody dispute, and delayed its ultimate resolution.

The North Carolina Psychology Board, following a hearing, disciplined Dr. Baker after determining that her conduct violated various ethical rules applicable to licensed psychologists. The Board prohibited Dr. Baker from taking on new cases for six months and imposed a set of training and monitoring requirements. Dr. Baker appealed that decision to superior court, which vacated the Board's decision.

As explained below, the Board's decision to impose discipline under N.C. Gen. Stat. § 90-270.15(a)(19) for failure to cooperate with other professionals to the potential or actual detriment of clients, patients, or other recipients of service is supported by substantial evidence under the whole record test and was not arbitrary or capricious. We therefore reverse the lower court's judgment on that issue. Dr.

Baker also argued in the lower court that the discipline imposed was too harsh and violated her due process rights. Because the court did not reach that issue, we remand the case for further proceedings.

Facts and Procedural History

Mark and Christa Vilas are former spouses and the parents of two minor children. Following their separation and divorce, Mr. and Ms. Vilas shared joint custody of their children.

In 2012, believing that modification of the existing custody arrangement would be in the children's best interests, Mr. Vilas requested that the court appoint a custody evaluator who would investigate the family circumstances to assist the court in making a potential custody modification. The court granted Mr. Vilas's request and appointed Dr. Baker.

Dr. Baker's evaluation took approximately two years to complete. During that two-year period, the Vilases and Mr. Vilas's attorney, Archie Futrell, had difficulty maintaining regular communication with Dr. Baker, who was undergoing treatment for breast cancer at the time.

On 23 July 2014, Mr. Vilas and his current wife, Katherine Vilas, filed a complaint against Dr. Baker with the North Carolina Psychology Board, alleging that Dr. Baker had been derelict in the execution of her duties as a court-appointed custody evaluator and licensed psychologist. Following a hearing, the Board issued a

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final decision which disciplined Dr. Baker by imposing various restrictions on her practice.

Dr. Baker petitioned for judicial review in Durham County Superior Court, alleging that the Board's final decision "was not supported by the evidence submitted to the Board" and "should be set aside as arbitrary, capricious, [and] an abuse of discretion." Following a hearing, the court entered an order vacating the Board's final decision. The Board timely appealed.

Analysis

"On judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review" to be applied by the court. *Trayford v. N.C. Psychology Bd.*, 174 N.C. App. 118, 120, 619 S.E.2d 862, 863 (2005), *aff'd per curiam*, 360 N.C. 396, 627 S.E.2d 462 (2006). When, as here, the party petitioning for judicial review contends that the agency's decision "was unsupported by the evidence or was arbitrary and capricious, the trial court applies the whole record test." *Fehrenbacher v. City of Durham*, 239 N.C. App. 141, 146, 768 S.E.2d 186, 191 (2015).

"The whole record test requires the reviewing court to examine all competent evidence to determine whether the agency decision is supported by substantial evidence." *Farber v. N.C. Psychology Bd.*, 153 N.C. App. 1, 14, 569 S.E.2d 287, 297

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(2002). “Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.” *Trayford*, 174 N.C. App. at 121, 619 S.E.2d at 864.

This Court reviews the lower court’s ruling for errors of law, using a two-fold approach: “(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.” *Fehrenbacher*, 239 N.C. App. at 147, 768 S.E.2d at 191. In other words, “[w]hen the issue for review is whether an agency decision was supported by substantial evidence or was arbitrary, capricious, or an abuse of discretion, this Court determines whether the trial court properly applied the whole record test.” *Barron v. Eastpointe Human Servs. LME*, __ N.C. App. __, __, 786 S.E.2d 304, 311 (2016).

We begin with the Board’s determination under N.C. Gen. Stat. § 90–270.15(a)(19), which permits the Board to discipline a licensed psychologist who “[h]as failed to cooperate with other psychologists or other professionals to the potential or actual detriment of clients, patients, or other recipients of service, or has behaved in ways which substantially impede or impair other psychologists’ or other professionals’ abilities to perform professional duties.”

Here, the Board disciplined Dr. Baker for her failure to cooperate with Archie Futrell, the attorney who represented Mr. Vilas. Mr. Futrell testified at the hearing before the Board about Dr. Baker’s lack of professional cooperation, including a gradual breakdown in his communication with Dr. Baker:

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I think [Dr. Baker] and I had a good rapport or good communications. Initially she was, I would say, right on top of it. . . .

And then as it proceeded, we had less communications. . . . And there were gaps when we couldn't get in touch with anyone.

I guess it became frustrating as time wore on. And what we were hoping would be four to six months turned out to be two years. And it was just a—not a good experience.

Mr. Futrell repeatedly called, emailed, and sent letters to Dr. Baker—none of which received any meaningful response. In two of his letters to Dr. Baker, Mr. Futrell emphasized that neither he nor Mr. Vilas had “heard anything from your office in months.” In an email to Dr. Baker, dated 5 November 2013, Mr. Futrell again highlighted the communication difficulties he had experienced while working with Dr. Baker:

When I recently sent you an email that I needed to talk to you, you responded that everything has to be in writing. I wanted to have an informal one-to-one conversation between professionals . . . but I guess that isn't going to happen.

. . .

Due to the fact that this has been going on for over a year, and due primarily to the fact that there has been no transparency or reasonable communication in the process, [Mr. Vilas] and I have lost all confidence in this evaluation process.

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Mr. Futrell also testified to the detrimental effects this lack of communication created for not only his client, Mr. Vilas, but also the Vilases' children, all of whom were recipients of Dr. Baker's services:

My client was concerned about inability to communicate with Dr. Baker. . . .

. . . [Mr. Vilas] was communicating with me that he had had many communications, just could not get in touch one way or the other. So I tried to make some communications on his behalf, I want to say maybe a couple of phone messages, you know, "Please give me a call" kind of talk, professional to professional sort of off the record type of thing, some e-mails, some letters, and just trying to get Dr. Baker to get this worked out because as it was dragging out, it was detrimental to our case certainly, but we felt also to the children, that they were not in a situation that we felt was healthy for them.

Mr. Vilas and Ms. Vilas themselves also testified to the negative impact Dr. Baker's conduct had on them and their children. Mr. Vilas testified as follows:

[T]his was really stressful. I mean, you know, watching my children go through this and for months and, you know, not feeling like I had any control over the situation, it was extremely stressful to me for the entire course of the evaluation. You know, I was going through this. My children were going through this. My wife was going through this. My ex-wife was going through this. . . .

I kept getting, you know, the cold shoulder. I kept getting told that, you know, "We don't know when this will be done. It will be four to sixth months," you know. . . .

[M]y relationship with my wife and my relationship with my ex-wife was very damaged by this whole process. And I don't know that I've actually—either one of those

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relationships has really recovered from it, to be honest.

Ms. Vilas also testified how her preexisting anxiety about the custody evaluation in general was amplified by the way the evaluation “got dragged out” and “lasted for a very long time.”

Finally, Mr. Futrell testified about the way Dr. Baker’s conduct negatively impacted his ability to effectively serve as Mr. Vilas’s counsel:

. . . I was having some personal concerns that my client at some point might—I’m going to use the word file a complaint against me or be dissatisfied with me, you know, “You recommended Dr. Baker and come on, this is—nothing is happening and you need to make something happen,” and, you know, “Do I need to get another evaluator,” you know, “What do I need to do?” . . .

So the client at this point was very angry and upset with me as well.

Futrell referenced the negative impact Dr. Baker’s conduct was having on his attorney-client relationship with Mr. Vilas in a 3 September 2013 letter to Dr. Baker. He wrote as follows: “Please call me immediately. What is going on? I am pretty embarrassed with my client, Mark Vilas, since I enthusiastically recommended you for this evaluation.”

Under the whole record test, this evidence is sufficient to support the Board’s decision because it is “relevant evidence a reasonable mind might accept as adequate” to support the Board’s finding that Dr. Baker “failed to cooperate with . . . other professionals to the potential or actual detriment of clients, patients, or other

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recipients of service” in violation of N.C. Gen. Stat. § 90–270.15(a)(19). Specifically, the Board properly determined that, by unreasonably failing to respond to Mr. Futrell’s and Mr. Vilas’s repeated attempts to learn the status of her evaluation over the course of many months, Dr. Baker caused the Vilases to suffer unnecessary stress and anxiety and harmed Mr. Futrell’s relationship with his client.

Dr. Baker does not dispute that she had a professional obligation to cooperate with Mr. Futrell and other professionals involved in this custody matter to avoid any potential harm to the Vilases and their children. N.C. Gen. Stat. § 90–270.15(a)(19). Instead, she argues that she “did, in fact, communicate with the parties” and that, to the extent she failed to communicate appropriately, “none of the parties suffered harm” as a result of her failure to communicate. Under a whole record review, the administrative record supports the Board’s rejection of both these arguments.

First, Dr. Baker points to records showing that she wrote to Mr. Futrell on 2 December 2012, met Ms. Vilas on 11 January 2013, and spoke to Mr. Vilas on the phone on 4 April 2013. But this argument ignores the Board’s findings about her failure to communicate at other times.

For example, the Board found that “[f]rom January 11, 2013 through September 3, 2013, [Dr. Baker] did not meet with any of the parties in the custody matter.” The Board also found that “[f]rom January through August 2013, [Mr. Vilas] would call [Dr. Baker’s] office and would not receive any calls back. He heard from

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her once during that time period.” Likewise, the Board described how Ms. Vilas found it “frustrating” that Dr. Baker did not respond to her attempts to communicate and that Dr. Baker’s staff often told her that she was unavailable or working a reduced schedule. Finally, the Board documented Mr. Futrell’s repeated efforts between May 2013 and September 2013 to communicate with Dr. Baker, with his letters and emails expressing increasing concern about the harmful effect the lack of communication was having on his client and the family.

The Board ultimately found the testimony of Mr. Vilas, Ms. Vilas, and Mr. Futrell concerning the failure to communicate to be credible and found Dr. Baker’s own testimony on this issue not credible. These findings are supported by the record and thus, under whole record review, we must accept them. *See Alexander v. Cumberland Cnty. Bd. of Educ.*, 171 N.C. App. 649, 659, 615 S.E.2d 408, 415 (2005). Accordingly, we reject Dr. Baker’s argument that the record showed she adequately communicated with Mr. Futrell and the Vilases.

Dr. Baker next contends that no client suffered any harm because of her failure to communicate because her “client was the Court, and in the end, the Court was satisfied with Dr. Baker’s work.” This argument ignores the text of the applicable statutory provision. Section 90–270.15(a)(19) does not depend on the *client’s* satisfaction with the psychologist’s performance. By its plain terms, the statute extends to the impact a psychologist’s conduct has on other professionals’ ability to

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do their job, including instances where a psychologist's lack of cooperation with another professional has the potential to (or does) detrimentally affect a recipient of the psychologist's services. *See* N.C. Gen. Stat. § 90–270.15(a)(19). Thus, even if we accept that the court was Dr. Baker's client and she owed no professional obligation to the parties or the children, that does not mean she could not be disciplined under § 90–270.15(a)(19) for her failure to communicate with Mr. Futrell in a manner that harmed the Vilases and their children.

Here, after finding the testimony of the Vilases and Mr. Futrell to be credible—including their lengthy testimony about the stress, anxiety, and pain that resulted from the inability to communicate with Dr. Baker and learn the status of the evaluation over the course of nearly two years—the Board determined that Dr. Baker's conduct violated the rules of her profession and subjected her to discipline under N.C. Gen. Stat. § 90–270.15(a)(19):

Respondent's conduct constitutes a violation of N.C. Gen. Stat. § 90–270.15(a)(19), insofar as she failed to cooperate with other professionals to the potential or actual detriment of clients, patients, or other recipients of service Specifically, [Dr. Baker's] failure to cooperate with [Mr. Futrell], as set forth in the findings of fact, caused stress on [the Vilases] and their children and resulted in a significant delay in the resolution of their custody matter. This alone warrants the disciplinary action taken by the Board.

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In light of the Board’s findings, the Board’s conclusion was not “unsupported by the evidence” and it was not “arbitrary and capricious.”¹ *Fehrenbacher*, 239 N.C. App. at 146, 768 S.E.2d at 191. Accordingly, we hold that the trial court improperly vacated the Board’s discipline on this ground.

In its final decision, the Board imposed the same discipline for each violation independently and stated that the violation of N.C. Gen. Stat. § 90–270.15(a)(19) “alone warrants the disciplinary action taken by the Board.” In the lower court, Dr. Baker argued that the discipline imposed was too harsh and violated her due process rights. The court never reached this issue because it concluded that all the grounds for discipline were unsupported by substantial evidence in the record.

We therefore remand this case to the superior court to address Dr. Baker’s remaining argument concerning the magnitude of the discipline imposed for her violation of N.C. Gen. Stat. § 90–270.15(a)(19).

¹ Dr. Baker also devotes a substantial portion of her briefing to the notion that, because Judge Christian testified under oath that she was satisfied with the length of time it took for Dr. Baker to prepare the evaluation, Dr. Baker could not be disciplined for delaying the proceeding. But the Board did not discipline Dr. Baker under N.C. Gen. Stat. § 90–270.15(a)(19) based on the length of time it took her to prepare her report (although the Board appears to have relied on that delay for discipline on other grounds). In its determination that Dr. Baker violated § 90–270.15(a)(19), the Board relied on the harm suffered by the Vilases and their children, and the corresponding “significant delay in the resolution of their custody matter.” The parties ultimately settled their custody dispute and the record supports the Board’s determination that Dr. Baker’s failure to properly communicate with Mr. Futrell caused a delay in that resolution, regardless of whether Dr. Baker’s report was timely or not.

Conclusion

We reverse the trial court's decision with respect to the Board's determination to impose discipline under N.C. Gen. Stat. § 90–270.15(a)(19) for failure to cooperate with other professionals to the potential or actual detriment of clients, patients, or other recipients of service and remand the case to superior court for further proceedings concerning Dr. Baker's challenge to the discipline imposed by the Board.

REVERSED IN PART AND REMANDED.

Judges CALABRIA and MURPHY concur.

Report per Rule 30(e).