

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-785-2

Filed: 6 August 2019

Office of Administrative Hearings, No. 17 DHR 04088

RALEIGH RADIOLOGY LLC d/b/a RALEIGH RADIOLOGY CARY, Petitioner,

v.

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF  
HEALTH SERVICE REGULATION, HEALTH CARE PLANNING & CERTIFICATE  
OF NEED, Respondent,

and

DUKE UNIVERSITY HEALTH SYSTEM, Respondent-Intervenor.

Appeal by Respondents and cross-appeal by Petitioner from an amended final decision entered 16 March 2018 by Judge J. Randolph Ward in the Office of Administrative Hearings. Heard originally in the Court of Appeals 13 March 2019. This matter was reconsidered in the Court pursuant to an order allowing Petitioner's Petition for Rehearing. This opinion supersedes the opinion *Raleigh Radiology v. NC DHHS*, No. 18-785, \_\_\_ N.C. App. \_\_\_, 827 S.E.2d 337 (2019), previously filed on 7 May 2019.

*Brooks, Pierce, McLendon Humphrey & Leonard, L.L.P., by James C. Adams, II, for Petitioner Raleigh Radiology LLC.*

*Attorney General Joshua H. Stein, by Assistant Attorney General Bethany A. Burgon, for Respondent N.C. Department of Health and Human Services, Division of Health Service Regulation, Health Care Planning & Certificate of Need.*

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*Poyner Spruill LLP, by Kenneth L. Burgess, William R. Shenton, and Matthew A. Fisher, for Respondent-Intervenor Duke University Health System.*

DILLON, Judge.

Petitioner Raleigh Radiology LLC (“Raleigh”) and Respondents N.C. Department of Health and Human Services, Division of Health Care Regulation, Healthcare Planning and Certificate of Need (the “Agency”), and Duke University Health System (“Duke”) all appeal a final decision of the Office of Administrative Hearings (“OAH”) regarding the award of a Certificate of Need (“CON”) for an MRI machine in Wake County.

I. Background

In early 2016, the Agency determined a need for a fixed MRI machine in Wake County and began fielding competitive requests. In April 2016, Duke and Raleigh each filed an application for a CON with the Agency.

Section 131E-183 of our General Statutes sets forth the procedure the Agency should use when reviewing applications for a CON. N.C. Gen. Stat. § 131E-183 (2016). The Agency uses a two stage process: First, the Agency reviews each application independently to make sure that it complies with certain statutory criteria. *See Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 385, 455 S.E.2d 455, 460 (1995) (citing N.C. Gen. Stat. § 131E-183(a)). Typically, if only one application is found to have complied with the statutory criteria, that applicant

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is awarded the CON. But if more than one application complies, the Agency moves to a second step, whereby the Agency conducts a comparative analysis of the compliant applications. *Britthaven*, 118 N.C. App. at 385, 455 S.E.2d at 461.

In the present case, the Agency approved Duke for the CON, denying Raleigh's application, on two alternate grounds. First, the Agency determined that Duke's application alone was compliant. Alternatively, the Agency conducted a comparative analysis, assuming *both* applications were compliant, and determined that Duke's application was superior.

In October 2016, Raleigh filed a Petition for Contested Case Hearing. After a hearing on the matter, the administrative law judge (the "ALJ") issued a Final Decision, determining that both applications were compliant *but that*, based on its own comparative analysis, Raleigh's application was superior. Accordingly, the ALJ reversed the decision of the Agency and awarded the CON to Raleigh.

Duke and the Agency timely appealed. Raleigh also timely cross-appealed.

## II. Standard of Review

We review a final decision from an ALJ for whether "substantial rights of the petitioners may have been prejudiced[.]" N.C. Gen. Stat. § 150B-51(b) (2018). We use a *de novo* standard if the petitioner appeals the final decision on grounds that it violates the constitution, exceeds statutory authority, was made upon unlawful procedure, or was affected by another error of law. N.C. Gen. Stat. § 150B-51(b)(1)-

(4), (c) (2018). And we use the whole record test if the petitioner alleges that the final decision is unsupported by the evidence or is “[a]rbitrary, capricious, or an abuse of discretion.” N.C. Gen. Stat. § 150B-51(b)(5)(6), (c) (2018).

### III. Analysis

On appeal, Duke and the Agency argue that the ALJ erred in reversing the Agency’s decision. Though successful in its appeal before the ALJ, Raleigh cross-appeals certain aspects of the ALJ’s decision and with the process in general. We address the issues raised in the appeal and cross-appeal below.

#### A. ALJ’s Finding that Duke’s Application Conformed

We first address Raleigh’s cross-appeal challenge to the ALJ’s finding that Duke’s application complied with the Agency criteria. That is, though the ALJ awarded Raleigh the CON based on a determination that Raleigh’s compliant application was superior to Duke’s compliant application, Raleigh contends that the ALJ should have determined that Duke’s application was not compliant to begin with. Specifically, Raleigh contends that Duke did *not* conform with Criteria 3, 5, 12, and 13(c) found in Section 131E-183(a). For the following reasons, we disagree.

We review this argument under the whole record test, N.C. Gen. Stat. § 150B-51(b)(5)(6), (c), and properly “take[] into account the administrative agency’s expertise” in evaluating applications for a CON. *Britthaven*, 118 N.C. App. at 386, 455 S.E.2d at 461.

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A review of the whole record reveals that the evidence presented by Duke in its CON application, the Agency hearings, and the Office of Administrative Hearings amounts to substantial evidence of Duke's compliance with the review criteria.

In conformity with Criteria 3, Duke "identif[ied] the population to be served by the proposed project, and . . . demonstrate[d] the need that this population has for the services proposed, and the extent to which all residents of the area . . . are likely to have access to the services proposed." N.C. Gen. Stat. § 131E-183(a)(3). More specifically, in its application, Duke illustrated the current levels of accessibility to MRI scanners in Wake County and identified the location of its proposed MRI, the Holly Springs/Southwest Wake County area, as one in need of increased access to scanners, particularly due to its rapidly growing population. Duke also laid out the current travel burdens faced by Wake County residents in the Duke Health System who require access to an MRI scanner and how the addition of a new MRI scanner in its proposed location could have a favorable impact on those geographic burdens. Duke coupled those factors with the historically consistent utilization rate for MRIs in Wake County to demonstrate the need in the area for the MRI scanner.

In conformity with Criteria 5, Duke provided financial and operational projections that demonstrated "the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal[.]" N.C. Gen. Stat. § 131E-183(a)(5). For example, Duke set forth the anticipated source

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of financing for the project, with all the funding projected to be drawn from its accumulated reserves. Duke also provided five-year projections for its financial position and income statements, as well as three-year projections for the revenues to be produced by the new MRI scanner. The Chief Financial Officer of Duke also certified the existence and availability of funding for the project and referenced Duke's most recent audited financial statement to demonstrate the availability of such funds.

Duke also conformed with Criteria 12 by delineating that the construction "cost, design, and means" were reasonable by comparing its proposed project with potential alternatives. N.C. Gen. Stat. § 131E-183(a)(12). Essentially, Duke compared its proposal to potential alternatives, including maintaining the status quo, developing the proposed MRI scanner in a different location, developing a mobile MRI service in Holly Springs, and pursuing the current project.

Lastly, Duke conformed with Criteria 13(c) by "demonstrat[ing] the contribution of the proposed service in meeting the health-related needs of the elderly and of members of medically underserved groups . . . [and] show[ing] [t]hat the elderly and the medically underserved groups identified in this subdivision will be served by [its] proposed services and the extent to which each of these groups is expected to utilize the proposed services[.]" N.C. Gen. Stat. § 131E-183(a)(13)(c). Duke demonstrated that it expects almost one-third (1/3) of its patients to be

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Medicare or Medicaid recipients and that it has the support of community programs, which help in providing healthcare access to low-income, uninsured residents of Wake County. In addition, Duke provided statistics regarding its interactions with female and elderly patients, along with its policy of non-discrimination against handicapped persons. Using this data, Duke asserted that these kinds of patients will receive the same access to the new MRI scanner at the Holly Springs location.

In accordance with our previous holdings in CON cases, this Court “cannot substitute our own judgment for that of the Agency if substantial evidence exists.” *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). Indeed, Duke met this threshold by putting forth the aforementioned evidence; and the Agency is entitled to deference, as Duke put forth substantial evidence of its conformity with these criteria. Thus, we affirm the ALJ’s finding of fact number 24 that Duke’s application was compliant.

### B. Comparative Analysis Review

Duke and the Agency argue that the ALJ erred in conducting its own comparative analysis review of the two CON applications. That is, they argue that the ALJ should have given deference to the Agency’ determination that Duke’s application was superior. We review this question of law *de novo*. *Cumberland Cty. Hosp. Sys. v. N.C. Dep’t of Health & Human Servs.*, 242 N.C. App. 524, 527, 776 S.E.2d 329, 332 (2015).

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Our Court has held that where the Agency compares two or more applications which otherwise comply with the statutory criteria, “[t]here is no statute or rule which requires the Agency to utilize *certain* comparative factors.” *Craven Reg’l Med. Auth. v. N.C. Dep’t of Health & Human Servs.*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 845 (2006) (emphasis added). But, rather, the Agency has discretion to determine factors by which it will compare competing applications. *Id.*

However, the ALJ on appeal of an Agency decision does not have this same discretion to conduct a comparative analysis. That is, where an unsuccessful applicant appeals an Agency decision in a CON case, the ALJ does *not* engage in a *de novo* review of the Agency decision, but simply reviews for correctness of the Agency decision, pursuant to N.C. Gen. Stat. § 150B-23(a). *E. Carolina Internal Med., P.A. v. N.C. Dep’t of Health & Human Servs.*, 211 N.C. App. 397, 405, 710 S.E.2d 245, 252 (2011). Indeed, “there is a presumption that ‘an administrative agency has properly performed its official duties.’” *Id.* at 411, 710 S.E.2d at 255 (quoting *In re Cmty. Ass’n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980)).

In the present case, the Agency reviewed Duke’s application and Raleigh’s application for the CON independently. *Britthaven*, 118 N.C. App. at 385, 455 S.E.2d at 460 (citing N.C. Gen. Stat. § 131E-183(a)). This review revealed that Duke’s application conformed with all criteria and that Raleigh failed to conform with respect to certain criteria. At that point, assuming that Raleigh’s application indeed failed



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to conform to certain criteria, it would have been appropriate for the Agency to proceed with issuing the CON to Duke. Nevertheless, the Agency, as stated in its seventy-four (74) pages of findings, additionally “conducted a comparative analysis of [Duke’s and Raleigh’s applications] to decide which [one] should be approved,” assuming that Raleigh’s application did satisfy all of the criteria. *See id.* at 385, 455 S.E.2d at 461.

The Agency, in its discretion, used seven comparative factors in reviewing the CON applications: (1) geographic distribution, (2) demonstration of need, (3) access by underserved groups, (4) ownership of fixed MRI scanners in Wake County, (5) projected average gross revenue per procedure, (6) projected average net revenue per procedure, and (7) projected average operating expense per procedure. This comparative analysis led the Agency to approve and award the CON to Duke.

However, on appeal to the OAH, the ALJ deviated from the above factors by considering two additional factors: (1) the types of scanners proposed by each applicant, and (2) the timeline of each proposed project. Admittedly, there was evidence that Raleigh’s proposed MRI machine was superior to the machine which Duke would use. It is this deviation and the reliance on additional comparative factors by the ALJ which we must conclude was error.

Indeed, adding two additional comparative factors is not affording deference to the Agency, but rather constitutes an impermissible *de novo* review of this part of the

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Agency's decision. Such a substitute of judgment by the ALJ is not allowed. *E. Carolina Internal Med.*, 211 N.C. App. at 405, 710 S.E.2d at 252.

Evidence was provided that the factors utilized by the Agency have been used in two previous MRI CON decisions and that the additional factors used by the ALJ have not been a part of the Agency's policies and procedures for many years. We note that information pertaining to Raleigh's allegedly superior MRI machine was not included in Raleigh's application, though it was otherwise presented at the Agency public hearing, but without an expert testifying as to the machine's medical efficacy. Even so, the Agency has the discretion to pick which factors it evaluates in conducting its own comparative analysis. *Craven Reg'l Med. Auth.*, 176 N.C. App. at 58, 625 S.E.2d at 845. Further, regarding the timeline factor used by the ALJ, there was testimony that the Agency puts little, if any, weight to this factor as the factor disadvantages new providers. The ALJ did not determine that the Agency acted arbitrarily and capriciously, but rather simply substituted his own judgment in weighing the factors. We cannot say, though, that the Agency abused its discretion to rely on the factors that it did. Therefore, we conclude that the ALJ exceeded its authority conducting a *de novo* comparative analysis of the competing applications.

Separately, Raleigh argues that the Agency erred by concluding that its application was not conforming. But even assuming that the Agency incorrectly made a determination that Raleigh's application did not conform to certain statutory

criteria, such error was harmless: the Agency proceeded with a comparative analysis of both applications as if Raleigh’s application did comply and, in its discretion, determined that Duke’s application was superior.

Therefore, we reverse the Final Decision and reinstate the decision of the Agency.<sup>1</sup>

C. Motion in Limine – Spoliation of Evidence

In its cross-appeal, Raleigh argues that the ALJ erred in denying its motion in limine to apply adverse inference based on Duke’s alleged spoliation of certain evidence. We disagree.

“[W]hen the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a factfinder may reasonably infer that the party probably did so because the records would harm its case.” *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 187-88, 527 S.E.2d 712, 718, *disc. rev. denied*, 352 N.C. 357, 544 S.E.2d 563 (2000). This inference is a permissible adverse inference. *Id.* “To qualify for [an] adverse inference, the party requesting it must ordinarily show that the spoliator was on notice of the claim or potential claim at the time of the destruction.”

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<sup>1</sup> We note that additional arguments were made on appeal. For instance, Duke and the Agency contend that Raleigh did not establish substantial prejudice and that the Final Decision was incomplete and untimely by thirty-seven (37) minutes. However, in light of the ALJ’s comparative analysis error and our subsequent reversal of the Final Decision, we need not address these arguments.

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*McLain*, 137 N.C. App. at 187, 527 S.E.2d at 718 (internal citations omitted). However, “[i]f there is a fair, frank and satisfactory explanation” for the absence of the documents, an adverse inference will not be applied. *Yarborough v. Hughes*, 139 N.C. 199, 211, 51 S.E. 904, 908 (1905).

In the present case, Duke contracted with a third-party consultant, (“Keystone”), to perform and draft its CON application. Keystone’s practice is to discard all useless documentation and application references so as to keep only relevant, accurate applications and data. This practice is consistent with most consultants in this field, it is not disputed, and amounts to “a fair, frank and satisfactory explanation[.]” *Id.*

Moreover, as Duke and the Agency correctly point out, these documents would not be the subject of review or an appeal. Rather, the ALJ’s review of the Agency’s decision is limited to its seventy-four pages of findings and conclusions. We conclude that the ALJ did not err in not applying an adverse inference based on the absence of certain documents.

## IV. Conclusion

The ALJ erred in not deferring to the comparative analysis performed by the Agency and conducting its own comparative analysis. However, the ALJ did not err in finding and concluding that Duke conformed with the applicable review criteria nor in not applying an adverse inference against Duke regarding certain information.

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Thus, we reverse the Final Decision and reinstate and affirm the decision of the Agency awarding the CON to Duke.<sup>2</sup>

REVERSED.

Judges BRYANT and ARROWOOD concur.

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<sup>2</sup> We acknowledge Raleigh's motion for leave to file a supplemental brief regarding the ALJ's authority to remand a contested case to the Agency. We deny this motion as our resolution has rendered such an issue moot.