IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 22, 2013 Session

DR. LARRY RAWDON v. TENNESSEE BOARD OF MEDICAL EXAMINERS

Appeal from the Chancery Court for Davidson County
No. 071804III Ellen Hobbs Lyle, Chancellor

No. M2012-02261-COA-R3-CV - Filed October 30, 2013

This appeal involves and Administrative Procedures Act proceeding in which the Tennessee Board of Medical Examiners appeals an order of the trial court which vacated a civil penalty imposed by the Board on a licensed pharmacist when the Board found that the pharmacist illegally practiced naturopathy and practiced medicine without a license. We affirm the judgment of the trial court vacating the penalty and remand the case with instructions for the court to remand the case to the Board of Medical Examiners for reconsideration of the penalty.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P. J., M. S., and ANDY D. BENNETT, J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; William E. Young, Solicitor General; Sara E. Sedgwick, Senior Counsel, for the appellant, the Tennessee Board of Medical Examiners.

Frank Scanlon and Samuel P. Helmbrecht, Nashville, Tennessee, for the appellee, Dr. Larry Rawdon.

OPINION

Dr. Larry Rawdon, who holds a Doctor of Pharmacy degree, is a licensed pharmacist residing in Hohenwald, Tennessee. In 2004 and 2005 the Tennessee Board of Pharmacy received complaints that he had been providing medical advice and treatment to several patients. An investigation ensued and the Pharmacy Board determined that Dr. Rawdon was

not operating a pharmacy or engaging in the practice of pharmacy; the complaint was dismissed and the matter referred to the Tennessee Board of Medical Examiners ("the Board"), which filed a Notice of Charges against Dr. Rawdon on July 18, 2006. Following a hearing, the Board found that Dr. Rawdon was practicing medicine without a license[1] and practicing naturopathy in violation of law;[2] the Board assessed a civil penalty of $1,000,000.00.

Dr. Rawdon filed a petition for review in Chancery Court and in due course the court entered an order remanding the case to the Board with the following instruction:

> [T]hat portion of the Board's Final Order in this matter that assesses civil penalties is hereby remanded to the Board, with instructions to the Board to deliberate further on the existing agency record and to clarify, in a supplemental Final Order, the Board's findings/basis with respect to the $1,000,000.00 civil penalties it imposed, including specifying the type(s), dollar amount(s) and quantities of such civil penalties in accordance with the provisions of Tenn. Code Ann. §§ 4-5-314(c) and 63-1-134, and Tenn. Comp. R. & Regs. 0880-2-.12(4).

On remand, the Board deliberated and entered a supplemental order as follows:

> Pursuant to Rule 0880-2-.12(4), practicing medicine without a license is one of the violations for which a Type A civil penalty is assessable and such penalty shall be assessed in an amount not less that $500 or more than $1000. Further, Tenn. Code Ann. § 63-1-134 provides that each day of continued

---

[1] Tenn. Code Ann. § 63-6-204 states:

> (a)(1) Any person shall be regarded as practicing medicine within the meaning of this chapter who treats, or professes to diagnose, treat, operates on or prescribes for any physical ailment or any physical injury to or deformity of another.

[2] Tenn. Code Ann. § 63-6-205 states in part pertinent to the issues in this appeal:

> (a) It is unlawful for any person to practice naturopathy in this state.
>
> (b) "Naturopathy" means nature cure or health by natural methods and is defined as the prevention, diagnosis and treatment of human injuries, ailments and disease by the use of such physical forces as air, light, water, vibration, heat, electricity, hydrotherapy, psychotherapy, dietetics or massage and the administration of botanical and biological drugs.

violation constitutes a separate violation. Based on these instructions and considering the factors listed in Rule 0880-2-.12(4) (d) and T.C.A. § 63-1-134(b), the Respondent is hereby assessed 12,710 Type A Civil Penalties in the amount of $500 each, for a total assessment of six-million three-hundred fifty-five thousand dollars ($6,355,000.00). This assessment is constituted as follows:

> (a) one civil penalty for each patient contact as admitted by Respondent and referenced in paragraph 5 of the Findings of Fact in the original Order entered June 11, 2007, for a total of 10,400 Type A civil penalties;
> (b) one civil penalty for each day Respondent practiced medicine in treating patient H. F., as described in paragraph 8 of the original Order, for a total of 660 Type A civil penalties;
> (c) one civil penalty for each day Respondent practiced medicine in treating patient D. N., as described in paragraph 10 of the original Order, for a total of 1,350 Type A civil penalties;
> (d) one civil penalty for each day Respondent practiced medicine in treating patient J. B., as described in paragraph 11 of the original Order, for a total of 150 Type A civil penalties;
> (e) one civil penalty for each day Respondent practiced medicine in treating patient M. P., as described in paragraph 13 of the original Order, for a total of 150 Type A civil penalties.

Following the return of the case, the trial court entered its Final Order in which it affirmed the Board's holding that Dr. Rawdon was practicing medicine without a license and was practicing naturopathy; the court vacated the $6,355,000.00 penalty assessment "because the penalty is unwarranted in law and/or without justification in fact."[3]

The Board appeals, contending that the court erred in vacating the civil penalty.

---

[3] The order noted:

> Although the remand by this Court was only a partial one confined to obtaining findings and reasoning for the $1,000,000.00 penalty, counsel for both parties agreed and stipulated that the amount as well could be reconsidered by the Board. Upon remand, the Board entered a Supplemental Final Order increasing the original assessment of civil penalties from $1,000,000.00 to $6,355,000.00. The Supplemental Order found that Dr. Rawdon had committed 12,710 violations and assessed Type A Civil Penalties in the amount of $500.00 for each violation. It is from this increased amount of civil penalties that Dr. Rawdon seeks judicial review.

I. STANDARD OF REVIEW

Judicial review of the Board's decision is governed by the narrow standard contained in Tenn. Code Ann. § 4-5-322(h). A court may modify or reverse the decision of the commission if the petitioner's rights have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (5) (A) Unsupported by evidence which is both substantial and material in the light of the entire record.
>
> (B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h).

The appropriate sanctions to be imposed in an agency proceeding is "peculiarly within the discretion of the agency." *McClellan v. Bd. of Regents of State University,* 921 S.W.2d 684, 693 (Tenn. 1996), and our review of an agency's sanctions is subject to "very limited judicial review." *Armstrong v. Metropolitan Nashville Hospital Authority*, No. M2004-01361-COA-R3-CV, 2006 WL 1547863, at *3 (Tenn. Ct. App. June 6, 2006) (citing *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185–86 (1973); *Woodard v. United States*, 725 F.2d 1072, 1077 (6th Cir. 1984); *McClellan*, 921 S.W.2d at 693). In reviewing an agency sanction, "we will only review whether the remedy is 'unwarranted in law' or 'without justification in fact.'" *Robertson v. Tennessee Bd. of Soc. Worker Certification & Licensure*, 227 S.W.3d 7, 14 (Tenn. 2007) (citing *Mosley v. Tenn. Dep't. of Commerce & Ins.,* 167 S.W.3d 308, 321 (Tenn. Ct. App. 2004) (quoting *Butz* 411 U.S. 182, 185–86)).

II. DISCUSSION

The law and regulations governing the imposition of sanctions in proceedings before the Board are set forth at Tenn. Code Ann. § 63-1-134[4] and Tenn. Comp. R. & Regs. 0880-2-.12(4),[5] respectively. In the supplemental order assessing the $6,355,000.00 sanction, the

---

[4] The pertinent provisions of Tenn. Code Ann. § 63-1-134 are the following:

> (a) With respect to any person required to be licensed, permitted or authorized by any board, commission or agency attached to the division of health related boards, each respective board, commission or agency may assess a civil penalty against such person in an amount not to exceed one thousand dollars ($1,000) for each separate violation of a statute, rule or order pertaining to such board, commission or agency. Each day of continued violation constitutes a separate violation.
>
> (b) Each board, commission or agency shall by rule establish a schedule designating the minimum and maximum civil penalties that may be assessed under this section. In assessing civil penalties, the following factors may be considered:
>
> (1) Whether the amount imposed will be a substantial economic deterrent to the violator;
>
> (2) The circumstances leading to the violation;
>
> (3) The severity of the violation and the risk of harm to the public;
>
> (4) The economic benefits gained by the violator as a result of noncompliance; and
>
> (5) The interest of the public.

[5] That portion of Tenn. Comp. R. & Regs. 0880-02-.12(4) pertinent to the issues in this appeal provides:

> (4) Civil Penalties
>
> (a) Purpose - The purpose of this is to set out a schedule designating the minimum and maximum civil penalties which may be assessed pursuant to T.C.A. §63-1-134.
>
> (b) Schedule of Civil Penalties
>
> 1. A Type A civil penalty may be imposed whenever the Board finds the person who is required to be licensed or certified, permitted or authorized by the Board guilty of a willful and knowing violation of the Practice Act, or regulations promulgated pursuant thereto, to such an extent that there is, or is likely to be an imminent, substantial threat to the health, safety and welfare of an individual client or the public. For purposes of this section, willfully and knowingly practicing medicine without a license, certification or other

(continued...)

Board affirmed the finding in the original order that Dr. Rawdon had committed 12,710 Type A civil penalties; of this figure, 10,400 were "patient contacts", 660 were related to Dr. Rawdon's treatment of patient H. F., 1,350 for his treatment of patient D. N., 150 each for his treatment of patients J. B. and M. P. The Board did not set forth any findings with respect to the factors at Tenn. Code Ann. § 63-1-134(b) or Tenn. Comp. R. & Regs. 0880-02-.12(4)(d)(3), other than to conclude that the action was "taken by the Board to protect the health, safety and welfare of the citizens of the State of Tennessee."

In its consideration of the propriety of the sanction, the trial court reviewed numerous Tennessee cases, as well as cases from other jurisdictions, on the manner of determining the

---

[5](...continued)
authorization from the Board is one of the violations of the Medical Practice Act for which a Type A civil penalty is assessable.

* * *

(c) Amount of Civil Penalties

1. Type A Civil Penalties shall be assessed in the amount of not less than $500 or more than $1,000.

* * *

(d) Procedures for Assessing Civil Penalties

* * *

2. Civil Penalties may also be initiated and assessed by the Board during consideration of any Notice of Charges. In addition, the Board may, upon good cause shown, assess a type and amount of civil penalty which was not recommended by the Division.

3. In assessing the civil penalties pursuant to these rules the Board may consider the following factors:

(i) Whether the amount imposed will be a substantial economic deterrent to the violator;

(ii) The circumstances leading to the violation;

(iii) The severity of the violation and the risk of harm to the public;

(iv) The economic benefits gained by the violator as a result of noncompliance; and,

(v) The interest of the public.

number of violations;[6] the court also conducted a survey of cases involving monetary penalties imposed by Tennessee administrative agencies.[7] The court then reviewed the record to identify the evidence the Board relied on to support the number of violations it found; no issue is raised in this appeal as to the court's identification of the evidence.[8]

The court went on to hold that the evidence did not support the Board's conclusion. In so doing, the court: (1) determined that the 10,400 patient contacts figure (referenced in subparagraph (a) of the portion of the supplemental order quoted above) was based on Dr. Rawdon's testimony that he had been in practice since 1998 and his estimate that he saw 8 to 10 patients per day and that the figure was "vague and not [a] reasonably certain basis"; (2) held that the 660 penalties for the treatment of H. F. was speculative because it was based on the 660 days between August 28, 1995, the first date H. F. saw Dr. Rawdon, and July 6, 1997, the date that he had an ultrasound, as H. P. recounted in a testimonial contained in a booklet distributed by Dr. Rawdon; and (3) held that the 1,350 penalties for the treatment of D. N., the 150 penalties each for the treatment of J. B and M. P., likewise based on testimonials in the booklet, were speculative. The court also reviewed patient records and determined that the records did not support the 12,710 violation figure. With respect to the amount of the penalty, the court reviewed Dr. Rawdon's tax information, noted that the Board had not made a finding of fact on the evidence, and held that "the proof of income in

---

[6] The court reviewed: *Johnson v. Tenn. Bd. of Medical Examiners*, No. M2002-00048-COA-R3-CV, 2003 WL 1442413 (Tenn. Ct. App. Mar. 19, 2003); *State v. Couch*, No. W2007-01059-COA-R3-CV, 2007 WL 4277443 (Tenn. Ct. App. Dec. 7, 2007); *Wright v. Tenn. Bd. of Medical Examiners in Psychology*, M2003-01654-COA-R3-CV, 2004 WL 3008881 (Tenn. Ct. App. Dec. 28, 2004); *Feldman v. Tenn. Bd. of Medical Examiners*, M2010-00831-COA-R3-CV, 2011 WL 2536471 (Tenn. Ct. App. June 27, 2011); *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446 (Tenn. 1995); *Cox v. Tenn. Bd. of Veterinary Med. Examiners*, M2010-01582-COA-R3-CV, 2011 WL 5043380 (Tenn. Ct. App. Oct. 21, 2011); *Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F. 3d 1123 (D.C. Cir. 2001); *Valdak Corp. v. Occupational Safety & Health Review Comm'n*., 73 F.3d 1466 (8th Cir. 1996).

[7] The court reviewed: *Richardson*, *supra*.; *Feldman*, *supra*.; *Cox*, *supra*.; *Roy v. Tenn. Bd. of Medical Examiners*, 310 S.W.3d 360 (Tenn. Ct. App. 2009); *Siddall v. Tenn. Bd. of Medical Examiners,* M2004-02767-COA-R3-CV, 2006 WL 1763665 (Tenn. Ct. App. June 27, 2006); *Wright*, *supra.*; *Johnson v. Tenn. Bd. of Medical Examiners,* M2002-00048-COA-R3-CV, 2003 WL 1442413 (Tenn. Ct. App. Mar. 19, 2003).

[8] By separate order the court notified the parties of the testimony and other evidence which the court deemed the Board relied upon in its determination that Dr. Rawdon committed 12,710 violations and requested counsel's input. In the Final Order the court noted that both counsel "provided excellent, thorough responses" from which "the Court has concluded that it had properly identified the places in the record" which related to the Board's computation of the number of penalties.

the record . . . does not furnish a basis to sustain the penalty."[9] Finally, the court reviewed the Board's deliberations and concluded:

> The Court's review of the deliberations revealed that they do hit upon the factors listed at [Tenn. Code Ann.] Section 63-1-134(b)(1)-(4) to be used in assessing a penalty, but that discussion does not cure the underlying deficiency of the proof provided to the Board. The deliberations provide further support that the Board had not specific, reasonable certain proof of the number of patients the petitioner illegally treated by engaging in the practice of medicine or naturopathy, nor specific, reasonable certain proof of the number of days such illegal treatment was engaged in or administered. The vague 8 to 10 patients per day from August 1998 estimate to arrive at the 10,440 number, and the vague, generalized testimonials in [the booklet distributed by Dr. Rawdon] to arrive at the 660, 1,350, 150, and 150 numbers were not cured by the deliberations. That vague and generalized proof remains. The Court is left with insufficient factual proof to support the penalty.

The Board argues that the court substituted its judgment for that of the Board in examining the evidence and erred further in requiring more detailed proof to support the penalty imposed.

After reviewing the record, we agree with the trial court that the evidence does not support the Board's conclusion as to the number of violations. The record shows that the Board's determination that Dr. Rawdon was guilty of 12,710 violations was based on the number of days in various time periods during which he either saw patients or treated patients, rather than the actual number of patient visits or treatments. The number of days in each time period measured by the Board is not substantial and material evidence in support of its finding of the number of violations, particularly in light of other evidence in the record. The Board cannot overlook the evidence of the actual number and dates of visits or treatments, as contained in the patient records and testimony, in its determination of the number of violations.[10]

---

[9] The court stated:

> Absent a finding of fact on this evidence, the Court does not know if the Board agreed to income proof as the basis for the penalty and what the Board's findings were with respect to such proof, that is whether the Board would have used gross income figures or reduced it by some variant of the number of adjustments to gross income contained in the record.

[10] For example, the Board did not give a factual basis for its determination that Dr. Rawdon incurred

(continued...)

Moreover, the record does not show the manner in which the Board considered the factors at Tenn. Code Ann. § 63-1-134(b) and Tenn. Comp. R. & Regs. 0880-02-.12(4)(d)(3) in determining the amount of the penalty. The Board made no findings in this regard in its initial order or supplemental order and in neither of the Board's deliberations relative to the amount of the penalty does the Board articulate or identify any specific factor guiding its judgment.

III. CONCLUSION

We do not take issue with the Board's concern as to the severity of the conduct in which Dr. Rawdon was engaged; we hold only that the Board's determination of the number of penalties was not supported by the evidence and that the Board did not articulate the factors it considered in assessing the penalty. For these reasons, the judgment of the trial court vacating the penalty is affirmed. The case is remanded to the trial court with instructions to return the case to the Board of Medical Examiners for reconsideration of the penalty, if any, to be imposed.

_____
RICHARD H. DINKINS, JUDGE

[10](...continued)
150 violations as a result of his treatment of M. P. other than stating that Dr. Rawdon "treated M. P. for cancer from at least August 2002 until at least January 2003." The patient record, however, shows that Dr. Rawdon saw patient M. P. on eight occasions: August 1, August 29, October 8, October 26, November 7, December 11, and December 26, 2002, and January 13 2003, so violations would have occurred on those dates. Casting further doubt on the basis for the Board's determination of the number of violations is the fact that the time period between August 1, 2002 and January 13, 2003 was 165 days.