Morgan v. Kentucky Board of Medical Licensure

2005 | Cited 0 times | Court of Appeals of Kentucky | July 29, 2005

NOT TO BE PUBLISHED

OPINION

AFFIRMING

BEFORE: HENRY, McANULTY, AND MINTON, JUDGES.

Kirk D. Morgan, M.D., appeals to this court from the Opinion and Order of the Jefferson Circuit Court upholding an Order of Indefinite Restriction entered against him by the Kentucky Board of Medical Licensure (KBML). We affirm.

Dr. Morgan graduated from the University of Louisville School of Medicine in 1971. He became the first family physician in Kentucky to be both residency trained and board-certified. He was briefly Director of the Family Medicine Residency program at the University of Louisville School of Medicine. He was engaged in practice as a family physician in Louisville from 1977 until 2000. Primarily because of his persistence in incorporating non-approved alternative forms of therapy into his practice[1], Dr. Morgan has practiced medicine under certain restrictions set out in Agreed Orders with the KBML since 1989.

On March 16, 2000, the KBML filed an administrative complaint against Dr. Morgan alleging that he had failed: 1) to conform to prescribed standards for record-keeping; 2) to work-up life threatening situations; 3) to provide complete care for his patients; 4) to monitor patients adequately for side-effects; 5) to follow up on abnormal laboratory values, and 6) to provide preventative health care. The KBML also alleged that Dr. Morgan had used "less effective" or alternative therapies with several patients. These allegations if proved would constitute violations of KRS[2] 311.595(13) and KRS 311.595(9) as illustrated by KRS 311.597(2), 311.597(3) and 311.597(4). The same date the KBML issued an Emergency Order of Suspension, suspending Dr. Morgan from practicing medicine. After an emergency hearing on April 18, 2000, the hearing officer affirmed the Emergency Order, finding that Dr. Morgan had violated the terms of an Agreed Order of Probation under which he had been practicing for several years. A final hearing on the March 16, 2000 complaint was scheduled for July, 2000, but both sides requested extensions of time to complete discovery, resulting in a delay of over two years. During this time, while the parties were exploring an informal adjustment of the complaint, they agreed that Dr. Morgan would submit to an assessment by the Colorado Personalized Education for Physicians (CPEP) program, which he did. The final hearing was held

February 27-28, 2003, and on May 12, 2003, the hearing officer entered Findings of Fact, Conclusions of Law and a Recommended Order. Although the hearing officer found that most of the allegations against Dr. Morgan were not supported by substantial evidence, she did find that Dr. Morgan had breached the required standard of care, and that there was substantial evidence to support a finding that Dr. Morgan had violated the Agreed Order under which KBML had allowed him to practice. The hearing officer felt that the three years Dr. Morgan had already been suspended from practice was sufficient punishment and recommended that he be allowed to return to practice on probation, with restrictions designed to rehabilitate his skills and protect the public.

The KBML reviewed the Findings of Fact, Conclusions of Law and Recommended Order of the hearing officer, and the exceptions filed thereto by both parties, and on August 12, 2003, issued its final order. Although the KBML adopted most of the hearing officer's findings and conclusions, a few were modified or supplemented. The KBML declined to accept the hearing officer's recommendation that Dr. Morgan be allowed to resume practicing medicine and instead entered an Indefinite Order of Restriction. Under the terms of that order, Dr. Morgan is only permitted to apply for reinstatement of his license if he either: 1) successfully completes an approved residency training program in family practice; 2) successfully completes a CPEP Education Course and Post Education Evaluation; or 3) successfully passes the American Board of Family Practice examination for Board Certification in Family Practice. Dr. Morgan appealed to the Jefferson Circuit Court, and on July 20, 2004, that court entered its Opinion and Order affirming the order of the KBML. This appeal followed.

On appeal, Dr. Morgan urges us to reverse the orders of the Jefferson Circuit Court and the KBML because: 1) the KBML failed to render its final order within the 90-day time period required by KRS 13B.120(4); and 2) the KBML's final order is arbitrary and capricious and not supported by substantial evidence.

We agree with the Jefferson Circuit Court's assessment of the standard of appellate review of the actions of administrative boards, set out in Aubrey v. Office of Attorney General, 994 S.W.2d 516 (Ky.App. 1998):

Where the legislature has designated an administrative agency to carry out a legislative policy by the exercise of discretionary judgment in a specialized field, the courts do not have the authority to review the agency decisions de novo. American Beauty Homes Corp. v. Louisville and Jefferson Co. Planning and Zoning Comm'n, 379 S.W.2d 450, 458 (Ky. 1964). Judicial review of the administrative action is confined to a determination of whether the action taken was arbitrary. City of Louisville v. McDonald, 470 S.W.2d 173, 178 (Ky. 1971). So long as the agency's decision is supported by substantial evidence of probative value, it is not arbitrary and must be accepted as binding by the appellate court. Starks v. Kentucky Health Facilities, 684 S.W. 2d 5 (Ky. 1984). Substantial evidence is defined as evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable persons. O'Nan v. Ecklar Moore Express, Inc., 339 S.W.2d 466 (Ky. 1960).

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In its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact. Kentucky State Racing Comm'n v. Fuller, 481 S.W.2d 298, 309 (Ky. 1972). However, this Court is authorized to review issues of law on a de novo basis. Mill St. Church of Christ v. Hogan, 785 S.W.2d 263, 266 (Ky.App. 1990). Id. at 518-19.

KRS 13B.120(4) states as follows:

(4) Except as otherwise required by federal law, the agency head shall render a final order in an administrative hearing within ninety (90) days after:

(a) The receipt of the official record of the hearing in which there was no hearing officer submitting a recommended order under KRS 13B.110; or

(b) The hearing officer submits a recommended order to the agency head, unless the matter is remanded to the hearing officer for further proceedings.

It is clear that subparagraph (b) of the statute applies to the case before us. The hearing officer's recommended order was submitted to the KBML on May 12, 2003. There was no remand to the hearing officer from the Board. The ninetieth day following May 12, 2003, was Sunday, August 10. Therefore the final order should have been entered no later than Monday August 11, 2003. See KRS 446.030.

The circuit court held that by issuing its final order only one day late, the KBML substantially complied with the law's requirements. We agree. As the court stated, "[t]ypically, the law requires strict compliance in situations where conferral of jurisdiction is at issue". For example, "[w]hen grace to appeal is granted by statute, a strict compliance with its terms is required." Board of Adjustments of the City of Richmond v. Flood, 581 S.W.2d 1, 2 (Ky. 1979); B.L. Radden & Sons, Inc. v. Copley, 891 S.W.2d 84, 86 (Ky.App. 1995). But where compliance is not jurisdictional, if there is an attempt to comply with the requirements of the statute, the agency's action will usually be upheld under the doctrine of substantial compliance. See Bentley v. Aero Energy, Inc., 903 S.W.2d 912 (Ky.App. 1995); Coleman v. Eastern Coal Corp., 913 S.W.2d 800 (Ky.App. 1995). In addition, compliance with time periods by administrative agencies usually does not affect the validity of the proceeding unless the statute both expressly requires compliance and establishes a consequence for failure to comply. Bentley at 914, citing Coleman v. United Parcel Service, 155 Vt. 646, 582 A.2d 151 (1990). We can find no penalty in the statute for failure to comply with KRS 13B.120(4); nor do we find evidence of a legislative intent that compliance with the 90-day period set out in KRS 13B.120 is either mandatory or a prerequisite to valid agency action; neither has Dr. Morgan demonstrated that he has suffered any significant prejudice as a result of the KBML having issued the order one day past the deadline. We are persuaded that the KBML attempted to comply with the deadline, and that the minimal delay in issuing the final order does not invalidate the board's action.

In support of his contention that the KBML's final order is arbitrary, capricious and not supported by substantial evidence, Dr. Morgan complains that the final order relies on matters outside the record. Dr. Morgan also alleges that the KBML wrongfully considered the length of time Dr. Morgan has been away from the practice of medicine as a reason to continue his suspension, even though it resulted at least in part from his exercising his procedural rights in the case. The circuit court carefully reviewed these allegations and found them to be without basis. Instead it appears that the KBML merely amplified some of the hearing officer's findings by including some additional matter that was already contained in the record. As the circuit court pointed out, KRS 13B.120(2) permits the KBML to "adopt [the hearing officer's recommended order] as the agency's final order, or ... reject or modify [it] in whole or in part, ... or ... remand the matter, in whole or in part, to the hearing officer for further proceedings as appropriate". We find nothing to indicate that the KBML considered "matters outside the record" in making its ruling.

It does not appear that the length of Dr. Morgan's absence from the practice of medicine was given undue weight by the KBML. Rather, it was considered as one of several factors. When discussing the issue, the KBML stated that "delays in the proceedings caused by or agreed to by the licensee shall not in themselves affect the appropriate disciplinary determination". As pointed out in the KBML's brief, contrary to the opinion stated by the hearing officer in her recommended order, the duration of the emergency suspension, by itself, is not a proper measure of appropriate disciplinary action in a matter involving a license to practice medicine. The KBML's primary goal, and its obligation to the public, is to establish that the respondent is competent to practice medicine without undue risk to patients.

The Opinion and Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

1. Beginning in 1989 Dr. Morgan's practice was restricted by agreed orders with the KBML limiting his use of chelation therapy and the use of hydrogen peroxide and hair analysis. In 1994 an agreed order of restriction was entered prohibiting Dr. Morgan's use of EDTA (ethylenediaminetetraacetic acid), chelation therapy, intravenous hydrogen peroxide, and/or intravenous germanium.

2. Kentucky Revised Statutes