IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-752

Filed: 3 April 2018

Union County, No. 16 CVS 3049

NORTH CAROLINA DEPARTMENT OF INSURANCE, Respondent,

v.

CHARLES T. MATHIS, Petitioner.

Appeal by respondent from an order entered 3 March 2017 by Judge C.W. Bragg in Union County Superior Court. Heard in the Court of Appeals 7 March 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Snipes Johnson and Assistant Attorney General Robert D. Croom, for respondent-appellant.

Bibbs Law Group, by Mark L. Bibbs, for petitioner-appellee.

ARROWOOD, Judge.

The North Carolina Department of Insurance ("respondent" or "NCDOI") appeals from an order vacating a final agency decision and remanding to the agency to allow for additional discovery and presentation of evidence. For the reasons stated herein, we reverse and remand.

I. Background

On 4 August 2015, respondent issued a Notice of Administrative Hearing seeking to revoke petitioner's surety bondsman, professional bondsman, and bail bond runner licenses, based on the allegation that petitioner violated Chapter 58, Article 71 of the North Carolina General Statutes by failing to include bonds on his monthly reports as required by statute and becoming liable on bonds that he knew, or should have known, were in excess of limits imposed by statute. *See* N.C. Gen. Stat. §§ 58-71-145, 58-71-175 (2017) (explaining that the fair market value of a bondsman's securities must be one-eighth of the amount of all his bonds ("eight times limit"), and that he cannot become liable on a bond, or bonds, for any one individual that total more than one-fourth of the value of the securities in his trust account ("quarter limit")). On 6 August 2015, the Notice of Administrative Hearing was served on petitioner by certified mail. Pursuant to N.C. Gen. Stat. § 150B-40(e) (2017), respondent requested that an administrative law judge with the Office of Administrative Hearings ("OAH") preside over the case. OAH assigned the case to the Honorable Administrative Law Judge (now Judge) Philip E. Berger, Jr. (the "ALJ").

The matter came on for hearing before the ALJ on 24-25 May 2016. At the time of the hearing, petitioner only held active licenses as a surety bondsman and a bail bond runner because his professional bondsman license lapsed on 21 July 2015. Pursuant to N.C. Gen. Stat. § 58-71-82 (2017), the licenses at issue were treated as

one license for the purpose of the disciplinary action. Respondent introduced as evidence: authenticated bank records, petitioner's monthly reports, and certified copies of court records of the bonds it alleged violated Chapter 58, Article 71 of the North Carolina General Statutes. Petitioner declined to present evidence at the hearing; however, he provided supplemental materials at the conclusion of the hearing, which the ALJ reviewed and considered in making his decision. Subsequently, the ALJ issued a proposed opinion, which concluded that petitioner violated Article 71, engaging in "a pattern of fraudulent and dishonest conduct[,]" and demonstrating incompetence and untrustworthiness. The ALJ recommended the revocation of petitioner's licenses based on petitioner's failure "to include bonds on his monthly reports" and "becoming liable on bonds when he knew or should have known that he was in excess of" both his quarter and eight times limits.

On 21 September 2016, a final argument and exceptions hearing was held at the NCDOI before Hearing Officer M. Benjamin Popkin. At the hearing, petitioner gave oral argument and exceptions to the ALJ's proposed opinion. On 16 November 2016, the agency issued a final decision, adopting the ALJ's findings and conclusions of law, and ordering the revocation of petitioner's bail bondsman and bail bond runner licenses.

On 21 November 2016, petitioner filed a "Petition for Review of Final Agency Decision of the North Carolina Department of Insurance Motion for Temporary

Restraining Order/and or Motion to Stay[.]" The petition requested review of the final decision pursuant to all six of the grounds listed in N.C. Gen. Stat. § 150B-51(b) (2017), and also requested the superior court "allow additional evidence to be taken by way of depositions and other forms of discovery[.]" The next day, the superior court entered an *ex parte* temporary restraining order, restraining the agency from revoking or suspending any and all licenses as enumerated in the agency's final decision. The *ex parte* temporary restraining order was subsequently dissolved, and petitioner's motion for stay of the final agency decision was denied on 1 December 2016.

The matter came on for hearing before the Honorable C.W. Bragg in Union County Superior Court on 23 January 2017. At the outset of the hearing, when asked whether he sought to introduce new or additional evidence or whether he was contesting findings of fact and conclusions of law, petitioner stated that he was contesting the agency's findings of fact and conclusions of law. Following petitioner's arguments, respondent offered arguments rebutting each of the claims listed in the petition. Based on the parties' arguments and review of the agency record, the superior court vacated the final agency decision and remanded the case to the agency "to allow additional discovery and the presentation of additional evidence at and [*sic*] administrative hearing in accordance with this order." The order also stayed the rehearing until the resolution of petitioner's criminal charges in Union County

Criminal Superior Court (15 CRS 917-19) "to see that justice is fairly and impartially administered and to protect the petitioner's due process rights[.]" Further discovery was not stayed.

Respondent appeals.

II. Discussion

Respondent presents two arguments on appeal: (1) the superior court misapplied the whole record standard of review, and (2) the superior court abused its discretion in remanding for additional discovery and presentation of evidence. We agree that the superior court misapplied the whole record standard of review. Therefore, we reverse the superior court's order, and, in the interest of judicial economy, we affirm the agency's final decision. Accordingly, we do not reach the issue of whether the superior court abused its discretion in remanding for additional discovery and presentation of evidence.

Pursuant to N.C. Gen. Stat. § 150B-51(b), a final agency decision may be reversed or modified by a reviewing court if "the substantial rights of the petitioner[ ] may have been prejudiced because" the agency's findings, inferences, conclusions, or decisions are:

> (1) In violation of constitutional provisions;
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> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
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> (3) Made upon unlawful procedure;

> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b). The superior court reviews errors of law *de novo*, and uses the whole record test "to review allegations that the agency decision was not supported by the evidence, or was arbitrary and capricious." *Kea v. Dep't of Health & Human Servs.*, 153 N.C. App. 595, 602, 570 S.E.2d 919, 924 (2002) (citation omitted). In reviewing "an agency decision, the trial court should state the standard of review it applied to resolve each issue." *Zimmerman v. Appalachian State Univ.,* 149 N.C. App. 121, 130, 560 S.E.2d 374, 380 (2002) (citation omitted). Our review of a superior court order from an appeal of an agency decision is two-fold: (1) whether the trial court exercised the proper scope of review, and, if so, (2) whether the trial court correctly applied this scope of review. *Kea*, 153 N.C. App. at 602, 570 S.E.2d at 924 (citation and internal quotation marks omitted).

Respondent argues that the superior court misapplied the whole record standard because: (1) it ignored the ALJ's findings of fact and conclusions of law, which were adopted by the agency and based on uncontradicted evidence, (2) it vacated and remanded the agency's decision without finding that the decision was

unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion, and (3) it engaged in impermissible fact finding. We agree.

To apply the whole record review standard, "the reviewing court [must] examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Kea*, 153 N.C. App. at 602, 570 S.E.2d at 924 (citation and internal quotation marks omitted) (alteration in original). A reviewing court applying the whole record test "may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *N. Carolina Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (citation and internal quotation marks omitted).

Instead, to apply the whole record standard of review, the court "must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." *Id.* at 660, 599 S.E.2d at 895 (citation and internal quotation marks omitted). "Substantial evidence" is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8c) (2017). "When an [agency] finds a fact in accordance with the uncontradicted evidence, little remains for the reviewing court to do, other than to find no error in the [agency's] election to accord the necessary weight and credibility

to the testimony[,]" because "it is for the [agency] . . . to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and appraise conflicting and circumstantial evidence." *N. Carolina Dep't of Correction v. Gibson*, 58 N.C. App. 241, 257, 293 S.E.2d 664, 674 (1982), *rev'd on other grounds*, 308 N.C. 131, 301 S.E.2d 78 (1983) (internal quotation marks and citations omitted).

In its order vacating and remanding the agency decision, the superior court expressly stated that it "conducted a whole record review of the petitioner's administrative hearing." Pursuant to N.C. Gen. Stat. § 150B-51(c), this was the appropriate standard of review to determine if the agency's findings, inferences, conclusions, or decisions are unsupported by substantial evidence, or arbitrary, capricious or an abuse of discretion.[1] However, the superior court did not correctly apply the whole record standard of review because it never determined whether the findings of fact and conclusions of law in the agency decision had a rational basis in the evidence.

Instead of reviewing the record to determine whether the agency's findings of fact and conclusions of law had adequate support, the superior court appears to have

[1] We note that the superior court's order never describes applying the *de novo* standard to review for an error pursuant to § 150B-51(b)(1)-(4), nor concludes whether there was such error, even though the petitioner did allege grounds for reversal based on § 150B-51(b)(1)-(4) in his petition and at the hearing. *See Kea*, 153 N.C. App. at 602, 570 S.E.2d at 924 (explaining that, pursuant to § 150B-51(c), questions of law are reviewed *de novo*).

undertaken an independent exercise in fact finding based on its own impressions of the record. In so doing, the superior court acted outside its authority by making these findings of fact without having determined whether the agency's findings of fact and conclusions of law were supported by substantial evidence. *See Yan-Min Wang v. UNC-CH Sch. of Med.*, 216 N.C. App. 185, 199, 716 S.E.2d 646, 655 (2011) (holding that a reviewing court may only make findings of fact at variance with those of the agency where the reviewing court determines that the findings of the agency are not supported by substantial evidence) (citation omitted); *Thompson v. Town of White Lake*, __ N.C. App. __, __, 797 S.E.2d 346, 352-53 (2017) (reversing a superior court's order reviewing a board of adjustment's zoning decision because the superior court impermissibly made its own findings of fact); *but see Cary Creek Ltd. P'ship v. Town of Cary*, 207 N.C. App. 339, 342, 700 S.E.2d 80, 83 (2010) (holding that findings of fact that merely "recite the [lower tribunal's] findings of fact and synthesize the evidence before [said lower tribunal]" do not constitute prejudicial error) (citation omitted).

Thus, although the superior court claims to have applied the whole record standard of review, we are unable to conclude that it did so. Instead, it vacated and remanded the agency's decision without reviewing to determine whether it was supported by substantial evidence, arbitrary or capricious, or an abuse of discretion, even though the superior court claimed to act pursuant to the whole record standard

of review. We reverse the superior court's order because it failed to correctly apply the standard of review.

> [I]n cases appealed from an administrative tribunal under the APA, . . . the trial court's erroneous application of the standard of review does not automatically necessitate remand, provided the appellate court can reasonably determine from the record whether the petitioner's asserted grounds for challenging the agency's final decision warrant reversal or modification of that decision under the applicable provisions of N.C. [Gen. Stat.] § 150B-51(b).

Carroll, 358 N.C. at 665, 599 S.E.2d at 898 (citation omitted); *see, e.g., Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 15-16, 565 S.E.2d 9, 18-19 (2002) (declining to remand for proper application of the appropriate standard of review in the interests of judicial economy). In the present case, the superior court's erroneous application of the whole record standard of review does not interfere with our ability to assess how that standard should have been applied. In the interest of judicial economy, we review the agency's final decision. We review asserted errors pursuant to N.C. Gen. Stat. § 150B-51(b)(1)-(4) *de novo* and § 150B-51(b)(5)-(6) under the whole record review standard. *See* N.C. Gen. Stat. § 150B-51(c).

Here, through the testimony of a NCDOI complaint analyst, respondent entered certified copies of court records for the bonds in question, authenticated bank records, and petitioner's own monthly reports as evidence. Petitioner refused to offer any evidence. Subsequently, based on respondent's uncontradicted evidence,

including documentary evidence from petitioner's own records, the ALJ made findings of fact, which in turn support his conclusions of law. Because the findings of fact were in accordance with the uncontradicted evidence before the ALJ, there was little for the superior court to do in this instance besides find no error with the final agency decision, as the necessary weight and credibility given to any testimony is within the agency's discretion. *See Gibson*, 58 N.C. App. at 257, 293 S.E.2d at 674.

Having reviewed the agency's findings of fact and conclusions of law in light of the record evidence, we hold they were not made upon unlawful procedures, or in violation of constitutional provisions, statutory authority, or jurisdiction of the agency. Moreover, viewing the record as a whole, the findings of fact and conclusions of law were supported by competent, material, and substantial evidence, and were not arbitrary, capricious, or an abuse of discretion. Accordingly, we reverse the superior court's order and remand with instructions to affirm the agency's final decision.

REVERSED AND REMANDED.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).