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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1048

Filed: 5 May 2020

Wake County, No. 18 CVS 12775

CARLOS J. PRIVETTE, D.D.S., Petitioner,

v.

THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS, Respondent.

Appeal by Petitioner from order entered 19 June 2019 by Judge C. Winston Gilchrist in Wake County Superior Court. Heard in the Court of Appeals 1 April 2020.

*Lewis Brisbois Bisgaard & Smith LLP, by Carrie E. Meigs and Justin G. May, for the Petitioner.*

*The Brocker Law Firm, P.A., by Douglas J. Brocker and Whitney S. Waldenberg, for the Respondent.*

BROOK, Judge.

Carlos J. Privette (“Petitioner”) appeals from the trial court’s order affirming the decision of the North Carolina Board of Dental Examiners (“Respondent”) to revoke his license to practice dentistry. We affirm the order of the trial court.

I. Factual and Procedural Background

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Petitioner was a dentist in private practice treating patients covered by Medicaid for twenty years. On 31 October 2017, the Investigative Panel for Respondent (“Investigative Panel”) issued a Notice of Hearing (“Notice”) to Petitioner. In the Notice, the Investigative Panel alleged 18 categories of fraudulent billing and misrepresentation in which Petitioner defrauded the North Carolina Health and Human Services, Division of Medical Assistance (“DMA”) by submitting and seeking reimbursement for billing codes submitted for dental procedures that were not warranted.

The Investigative Panel also alleged eight separate categories in the Notice in which Petitioner had violated the standard of care applicable to general dentistry. The 26 categories of misconduct identified in the Notice involved close to 100 patients, with most of the 26 categories involving multiple patients.

After conducting extensive discovery, the Investigative Panel proceeded with 25 of the 26 categories of alleged misconduct at a contested case hearing. At issue collectively were over 1,000 alleged violations – over 800 for improper billing and over 200 for negligent care. The contested case hearing was held on 8 and 9 June 2018 and 13 and 14 July 2018, spanning two of Respondent’s full monthly meetings. At the conclusion of the hearing, the Hearing Panel announced that Petitioner’s license to practice dentistry would be revoked, finding unanimously that emergency revocation and summary suspension of Petitioner’s license was required. An Order

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Summarily Suspending Petitioner's License dated 20 July 2018 was served on Petitioner through counsel on 23 July 2018. Respondent revoked Petitioner's license in an Order of Discipline dated 20 September 2018.

Petitioner then petitioned for judicial review of the decision in Wake County Superior Court on 19 October 2018. The matter came on for hearing before the Honorable C. Winston Gilchrist on 6 June 2019. Judge Gilchrist denied the petition for judicial review and affirmed Respondent's decision in an order entered 19 June 2019. Petitioner was served with the order through counsel on 2 August 2019. Petitioner entered timely written notice of appeal from the trial court's order on 23 August 2019.

II. Analysis

Two questions are presented by this appeal. The first is whether Respondent complied with the North Carolina Administrative Procedure Act when it revoked Petitioner's license to practice dentistry. We hold that it did. The second is whether it was an abuse of discretion by Respondent to accept the tender of an expert witness, Richard Orłowski, D.D.S., and relatedly, whether the evidence offered by Dr. Orłowski was proper expert opinion testimony under Rule 702 of the North Carolina Rules of Evidence. We hold that neither Respondent, in revoking Petitioner's license, nor the trial court, in affirming the revocation, committed an abuse of discretion by

allowing the admission of Dr. Orlowski's opinions, and that Dr. Orlowski's testimony was proper under Rule 702.

We begin our discussion by reviewing the regulatory framework in North Carolina governing the suspension and revocation of a license to practice dentistry. Then we turn to Petitioner's arguments related to the issues presented by the appeal, addressing them in turn.

### A. Regulatory Framework

#### i. Overview

Article 2 of Chapter 90 of North Carolina's General Statutes sets forth regulations concerning the practice of dentistry in North Carolina and provisions governing the activities of the Dental Board. In promulgating article 2, the general assembly specifically declared the importance of the legislation for the people of North Carolina. N.C. Gen. Stat. § 90-22(a) [] states that the "practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest."

The task of protecting the public and promoting the public interest in the competent practice of dentistry has been entrusted by the legislature to the Dental Board. . . . This legislative intent to entrust the Dental Board with the oversight and regulation of the practice of dentistry is evident throughout the article. . . .

In carrying out its public function, N.C. Gen. Stat. § 90-41 [] authorizes the Dental Board to take disciplinary action against licensed dentists for various actions and omissions.

*Armstrong v. Bd. of Dental Examiners*, 129 N.C. App. 153, 155-56, 499 S.E.2d 462, 465 (1998).

ii. Relevant Bases for Discipline

North Carolina General Statute § 90-41 in relevant part authorizes Respondent to suspend or revoke a license to practice dentistry “in any instance or instances in which the Board is satisfied that . . . [a] licensee”:

(6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;

. . .

(10) Has engaged in such immoral conduct as to discredit the dental profession;

(11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;

(12) Has been negligent in the practice of dentistry;

. . .

(17) Has committed any fraudulent or misleading acts in the practice of dentistry[.]

N.C. Gen. Stat. § 90-41(a) (2019).

“Under the statute, the Board may impose sanctions if it ‘is satisfied’ that such . . . [misconduct] has occurred.” *Armstrong*, 129 N.C. App. at 156, 499 S.E.2d at 465.

“Upon such a finding, it may, among other sanctions, ‘revoke or suspend a license to

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practice dentistry' and 'invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper.'" *Id.*, 499 S.E.2d 465-66 (quoting N.C. Gen. Stat. § 90-41(a) (2019)).

B. Final Agency Decision by Respondent

i. Standard of Review

"When reviewing a final agency decision of the Board, the Superior Court sits as an appellate court." *Id.*, 499 S.E.2d at 466. "This Court and the superior court employ the same standard of review." *Id.* Our Court has explained that under this standard,

[t]he reviewing court, both trial and appellate, while obligated to consider evidence of record that detracts from the administrative ruling, is not free to weigh all of the evidence and reach its own conclusion on the merits. The "whole record" test demands that if, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand. In this context substantial evidence has been held to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Therefore, in reaching its decision, the reviewing court is prohibited from replacing the Agency's findings of fact with its own judgment of how credible, or incredible, the testimony appears to them to be, so long as substantial evidence of those findings exist in the whole record.

*Little v. Bd. of Dental Exam'rs*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983)

(internal marks and citations omitted).

ii. Merits

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Under the North Carolina Administrative Procedure Act (“APA”), Respondent was required to “make a written final decision or order in [this] contested case.” N.C. Gen. Stat. § 150B-42(a) (2019). A number of Petitioner’s arguments challenging Respondent’s compliance with the APA, including his first argument in this vein, is predicated on the theory that the decision rendered by Respondent on the final day of the contested case hearing resulting in the revocation of his license to practice dentistry constituted the “decision” to which N.C. Gen. Stat. § 150B-42(a) refers. Because there had not yet been compliance with the other requirements of § 150B-42(a) on the final day of the hearing and the summary revocation rendered that day did not comply with the requirement that the decision be in writing, Petitioner contends that the revocation proceeding did not comply with the APA. We disagree.

On 13 July 2018, the third and final day of the hearing resulting in the revocation of Petitioner’s license, Chairman of the Hearing Panel Merlin W. Young, D.D.S., rendered the following decision on behalf of Respondent:

To the following five issues that the Investigative Panel contends are contested, the Panel answers yes, that Dr. Privette obtained or attempted to obtain fees through fraud, misrepresentation, or deceit in violation of NC General Statute 90-41(a)(11), as set forth in the Notice of Hearing; that Dr. Privette committed fraudulent and misleading acts in the practice of dentistry in violation of NC General Statute 90-41(a)(17), as set forth in the Notice of Hearing; that Dr. Privette engaged in such immoral conduct as to discredit the dental profession in violation of NC General Statute 90-41(a)(10), as set forth in the Notice of Hearing; that Dr. Privette violated the standard of care

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and thereby engaged in negligence in the practice of dentistry in violation of NC General Statute 90-41(a)(12), as set forth in the Notice of Hearing; that Dr. Privette engaged in acts violative of Article 2 of Chapter 90 of the North Carolina General Statute in violation of North Carolina General Statute 90-41(a)(6), as set forth in the Notice of Hearing. And to repeat, the Panel answered yes to all of those questions. And I would also like to mention the Board was unanimous in that decision.

By an order dated 20 July 2018, Dr. Young reduced the revocation to writing, ordering that Petitioner's license be summarily suspended, effective on the date of Petitioner's receipt of service of the order of summary suspension, as prescribed by N.C. Gen. Stat. § 150B-3(c). *See* N.C. Gen. Stat. § 150B-3(c) (2019) ("summary suspension of a license . . . may be ordered effective on . . . service of the certified copy of the order at the last known address of the licensee"). Respondent then made a final agency decision in an Order of Discipline revoking Petitioner's license on 6 September 2018.

Under North Carolina General Statute § 150B-42,

[a]fter . . . review of the official record, . . . an agency shall make a written final decision or order in a contested case. The decision or order shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them.

*Id.* § 150B-42.



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We hold that the 6 September 2018 Order of Discipline was the final agency action to which the requirements of N.C. Gen. Stat. § 150B-42 apply, not the decision rendered by Respondent at the conclusion of the final day of the hearing, as Petitioner suggests. As this Court has noted previously, N.C. Gen. Stat. § 150B-42 “does not discuss the ‘rendering’ of a decision[.]” *Walton v. State Treasurer*, 176 N.C. App. 273, 276, 625 S.E.2d 883, 885 (2006). In this case, as in *Walton*, Petitioner’s “oral announcement did not constitute a final decision[.]” *Id.*

Petitioner additionally contends that the revocation proceeding was defective because he was deprived of the opportunity to submit proposed findings and exceptions into the official agency record before Respondent made a final agency decision. However, this contention is belied by the record. After Dr. Young announced Respondent’s decision at the conclusion of the final day of the hearing, the following colloquy transpired:

MR. MORELOCK: Dr. Young has requested that Mr. Brocker [counsel for the Investigative Panel] draft the Order, share that with Ms. Meigs [counsel for Petitioner]. Do you have a – can you give me a time estimate of when that – when you can get a draft to opposing counsel?

MR. BROCKER: Are you talking about a final?

MR. MORELOCK: Final Agency Decision with Findings.

. . .

So you’ll serve a draft on Ms. Meigs –

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MR. BROCKER: Yes.

MR. MORELOCK: – within six weeks from today?

MR. BROCKER: Yes.

MR. MORELOCK: How much time would you need to propose your Findings in opposition or otherwise?

MS. MEIGS: I'm trying to think of what six weeks from today will –

MR. MORELOCK: Looks like?

MS. MEIGS: Yeah. I'm just not recalling. I know I have a trial coming up, and so that could influence it.

MR. MORELOCK: I think we're in – we're now – that would be in the first week of September or so.

MS. MEIGS: Right now, Mr. Brocker and I have a formal hearing at the September Board meeting, so that could be a little bit challenging to try to prepare – review and prepare proposals while also –

MR. MORELOCK: Right. Well, let's just start with the six weeks to draft and serve a proposed Final Agency Decision, and we'll go from there.

MS. MEIGS: Thank you.

MR. MORELOCK: And if you all do not resolve the Findings of Fact, then I'm sure you'll have a version, and the Board will have to make a decision about the discrepancies.

However, counsel for Petitioner never submitted any proposed findings or exceptions to the proposed Order of Discipline prepared by counsel for the Investigatory Panel,

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as contemplated on the final day of the hearing. That Petitioner failed to avail himself of the opportunity he was provided by Respondent did not constitute a deprivation by Respondent to Petitioner of an opportunity to avail himself of this opportunity.

Petitioner also suggests that his choice not to avail himself of the opportunity to submit proposed findings or exceptions after receiving the proposed Order of Discipline supports the idea that Respondent abdicated its role as a neutral factfinder during the proceeding. Nothing in the record supports Petitioner's suggestion that Respondent abdicated its role as a neutral factfinder. We therefore reject not only the contention that Petitioner's choice not to avail himself of the opportunity to submit proposed findings constituted a deprivation of this opportunity by Respondent, but also the suggestion that Respondent did not act as a neutral factfinder. There is no support in the record for either of these theories.

C. Dr. Orlowski's Expert Testimony

i. Standard of Review

The admissibility of expert testimony under Rule of Evidence 702(a) is an issue of fact reviewed on appeal for an abuse of discretion. *State v. Shore*, 258 N.C. App. 660, 665, 814 S.E.2d 464, 468 (2018). Demonstrating an abuse of discretion on appeal requires "a showing that [a] ruling was manifestly unsupported by reason and could

not have been the result of a reasoned decision.” *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

ii. Acceptance of Dr. Orlowski as an Expert

Petitioner argues that the acceptance by Respondent of the tender of Richard Orlowski, D.D.S., as an expert in the area of general dentistry, including the application of proper billing codes used for general dentistry services, over Petitioner’s objection, violated Rule 702 of the North Carolina Rules of Evidence. We disagree.

Under Rule 702 of the North Carolina Rules of Evidence,

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2019). Our Supreme Court has explained:

Rule 702(a) has three main parts, and expert testimony must satisfy each to be admissible. First, the area of proposed testimony must be based on “scientific, technical or other specialized knowledge” that “will assist the trier of fact to understand the evidence or to determine a fact in

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issue.” . . . In order to “assist the trier of fact,” expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience. . . .

Second, the witness must be “qualified as an expert by knowledge, skill, experience, training, or education.” This portion of the rule focuses on the witness’s competence to testify as an expert in the field of his or her proposed testimony. Expertise can come from practical experience as much as from academic training. . . .

Third, the testimony must meet the three-pronged reliability test[.]

*State v. McGrady*, 368 N.C. 880, 889-90, 787 S.E.2d 1, 8-9 (2016) (internal footnote and citations omitted).

Dr. Orlowski testified in detail about his qualifications and experience to lay a foundation to offer opinions in the areas of general dentistry and the codes used for billing general dentistry services before he was tendered and accepted by Respondent as an expert. Dr. Orlowski testified, for example, that he had been a licensed dentist for over 40 years at the time of his testimony; that he had worked for a private insurance carrier for five years credentialing new general dentistry service providers, reviewing billing submissions and developing and implementing systems for identifying improper billing.

Dr. Orlowski also testified he had been tendered and accepted by Respondent previously in another contested case related to standard of care issues. This testimony amply supports Respondent’s acceptance of Dr. Orlowski as an expert in

the area of general dentistry and the correct use of billing codes used in general dentistry services, and the trial court's affirmance of the final agency decision resulting in the revocation of Petitioner's license to practice dentistry. We therefore hold that neither Respondent nor the trial court committed an abuse of discretion by accepting the tender of Dr. Orlowski as an expert in the areas proffered in affirming the decision to revoke Petitioner's license,

iii. Soundness of the Basis for Dr. Orlowski's Testimony

Petitioner argues that Dr. Orlowski offered opinions in his testimony that violated what our Supreme Court termed "the three-pronged reliability test" in *McGrady*, in violation of Rule 702. *Id.* at 890, 787 S.E.2d at 9. We disagree.

The three-pronged reliability test requires:

- (1) The testimony must be based upon sufficient facts or data.
- (2) The testimony must be the product of reliable principles and methods.
- (3) The witness must have applied the principles and methods reliably to the facts of the case.

*Id.* (internal marks and citations omitted).

The Supreme Court in *McGrady* cautioned that "[t]he precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony," emphasizing the discretion the factfinder enjoys to "determin[e] how to address the three prongs of the reliability test." *Id.* The "trial court must have the

same kind of latitude in deciding how to test an expert's reliability as it enjoys when it decides *whether* that expert's relevant testimony is reliable." *Id.* (internal marks and citation omitted) (emphasis in original).

Respondent found that Dr. Orlowski's expert testimony on both billing and standard of care issues was credible and scientifically reliable, finding in relevant part as follows:

139. Dr. Orlowski testified that Respondent violated the applicable standard of care in his care and treatment by failing to adequately document the periodontal status and address the periodontal needs of example patients Shamiyra B and Elysia P. The Hearing Panel found Dr. Orlowski's testimony on these issues credible and of assistance to it.

140. Independent of Dr. Orlowski's testimony, the Hearing Panel members used their collective experience, technical competence, and specialized knowledge to analyze the treatment records, radiographs, and other evidence to find that Respondent's treatment of example patients Shamiyra B. and Elysia P. and other patient set forth in the notice of hearing and accompanying updated table [] failed to meet the minimal threshold of acceptable care and violated the applicable standard of care by failing to adequately document their periodontal status and address their periodontal needs.

...

141. In addition to reaching its own independent findings on each of the eight (8) standard of care issues, the Hearing Panel also considered Dr. Orlowski's testimony that Respondent violated the applicable standard of care on each of the issues discussed herein and found his testimony to be based on sufficient facts or data, and resulting from

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his proper application of reliable medical or scientific principles and methods in reaching his opinions.

142. Dr. Orlowski's testimony provided an additional, independent, and separate basis for the Hearing Panel's findings that Respondent repeatedly failed to meet the minimal threshold of acceptable care and violated the standard of care in treating numerous patients.

. . .

270. The Hearing Panel members used their collective experience, technical competence, and specialized knowledge to analyze the treatment and billing records, radiographs, testimony, and other evidence to find, in each of the seventeen (17) billing areas discussed above, that Respondent repeatedly misrepresented to DMA the dental services he claimed to provide the example patients set forth in the notice of hearing and corresponding tables . . . . The Hearing Panel's analysis and findings on these issues was conducted independent of the testimony of the investigative panel's expert witness, Dr. Orlowski.

. . .

272. Dr. Orlowski had extensive experience in the use and application of CDT Codes and had reviewed and was sufficiently familiar with the DMA Clinical Coverage Policies. The Hearing Panel found Dr. Orlowski's testimony on these issues to be credible and of assistance to it.

. . .

274. Dr. Orlowski's testimony provided an additional, independent, and separate basis for the Hearing Panel's findings that Respondent repeatedly misrepresented to DMA the dental services he claimed to provide to the example patients set forth in the notice of hearing and corresponding updated tables . . . .



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In addition, Respondent found that the “Hearing Panel members used their collective experience, technical competence, and specialized knowledge to conclude that in many of the example instances [of misconduct], the patient suffered clinical harm as a result of Respondent’s substandard of care.”

Petitioner has not demonstrated any abuse of discretion by Respondent, or the trial court in affirming the decision by Respondent to revoke his license, to allow Dr. Orlowski to offer opinions about the propriety of the billing claims Petitioner submitted for reimbursement to Medicaid or whether the general dentistry services rendered by Petitioner met the applicable standard of care. Indeed, on the record before us, he could not.

While it is true Dr. Orlowski conceded during his testimony that his own private practice experience did not include submitting claims to Medicaid, the billing codes used to identify dental procedures and request reimbursement from Medicaid and from private insurers are the same. Substantial evidence in the record supports Respondent’s findings regarding Dr. Orlowski’s testimony and our review of this record does not disclose any of Dr. Orlowski’s opinions were unreliable as a matter of law and thus outside the bounds of permissible expert opinion testimony under Rule 702 of the North Carolina Rules of Evidence.

III. Conclusion

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Respondent complied with the North Carolina Administrative Procedure Act. Neither Respondent, nor the trial court in affirming Respondent's decision to revoke Petitioner's license, committed an abuse of discretion. We affirm the order of the trial court affirming the decision by Respondent to revoke Petitioner's license to practice dentistry.

AFFIRMED.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).