2016 IL App (1st) 151284-U

THIRD DIVISION
March 16, 2016

No. 1-15-1284

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ARNOLD G. PHILLIPS, M.D.,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellant,	)	Cook County.
	)	
v.	)	
	)	
ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION and JAY STEWART, Director of the Division of Regulation of the Illinois Department of Financial and Professional Regulation.	)	No. 13 CH 22837
	)	The Honorable
	)	Kathleen M. Pantle
Petitioners-Appellees.	)	Judge, presiding.
	)	

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The Illinois Department of Financial and Professional Regulation's reprimand and sanction against respondent was not against the manifest weight of the evidence.

¶ 2 Respondent Dr. Arnold G. Philips appeals from an order of the circuit court of Cook County affirming his reprimand and fine of $10,000 from the Illinois Department of Financial

and Professional Regulation (Department). On appeal, respondent contends the administrative law judge (ALJ) erred in allowing the Department's medical expert to testify because he did not meet the prerequisite showing that he was familiar with the methods observed by nuclear medicine physicians working in solo practices. Respondent also contends that since Blue Cross/Blue Shield (BCBS) made partial payment on the patient's treatment, the bill was *prima facie* reasonable. Respondent next contends that the ALJ deprived him of a fair hearing by requiring his medical expert to present live testimony. Further, respondent contends that the Department imposed an improper sanction payable within 60 days from the final judgment. Finally, respondent contends that he was prejudiced by the ALJ allowing his prior disciplinary sanction into evidence. We affirm.

¶ 3 BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. In June, 2008, chiropractor Dr. Garth Edwards referred his patient D.H. to respondent, a nuclear medicine doctor, for a bone scan due to neck pain. After performing a limited history and physical examination on D.H., respondent ordered a whole body analogue bone scan. Respondent performed the bone scan in addition to a digital body scan on eight specific areas of D.H's body.

¶ 5 On December 5, 2011, the Department filed an amended administrative complaint against respondent, alleging that he violated the Medical Practice Act of 1987 (Act) (225 ILCS 60/1 *et seq.*), and thus, should have his license suspended, revoked, or be otherwise disciplined. Specifically, in pertinent part, respondent (1) made a false representation to induce his patient to undergo a medical procedure (Count I); (2) conducted and charged the patient for services that, if done at all, ordinarily would be performed by a physician (Count III); and (3) performed and charged the patient for duplicative services (Count IV).

¶ 6 After discovery had closed, plaintiff filed a motion to substitute his original medical expert for Dr. Robert S. Hellman, M.D., who would provide testimony by phone. The ALJ granted respondent's motion to substitute his expert, but denied respondent's request to allow Dr. Hellman to testify by phone. The ALJ then rescheduled the second day of the hearing to allow for Dr. Hellman's testimony.

¶ 7 At the December 7, 2012 hearing, respondent asked the ALJ permission to take an evidence deposition of Dr. Hellman in his Wisconsin offices because he was unable to travel to Chicago. The ALJ denied respondent's request because "judicial economy would necessitate that the individual be here, live testimony so [he could] judge [Dr. Hellman's] credibility, as well as to answer and rule on any type of questions that may be brought up." The ALJ also noted that he did allow the expert substitution after discovery had closed and he would allow for a continuance when all could be present for Dr. Hellman's testimony. Dr. Hellman, however, was never called to testify at a later date.

¶ 8 Respondent first testified as an adverse party witness. He admitted to being disciplined and fined in the past for failing to disclose fees to his patients in writing. Respondent performed an analogue bone scan on D.H., which "[was] an attempt to use nuclear medicine procedures to image the patient's skeletal system . . . to determine if there [were] abnormalities." The nuclear medicine camera displayed the analogue image directly to the film, whereas, a digital image was displayed directly onto a computer system to be analyzed in further detail. Respondent also performed a digital scan on D.H., but only in areas where he found an abnormality on the previous analogue study. When asked what information you could get from an analogue study that you could not get from a digital study, respondent answered that he was "totally confused by [the] question, because it's the reverse." He noted that "it's impossible – technologically

impossible to do an analysis on an analogue. You need digital studies for that." And when further pressed about the significance of the analogue study he said, "I cannot answer that question." He admitted to charging D.H. $7,207.25 for the analogue study, digital study, limited history and physical examination, but her insurance only covered $2,000.

¶ 9 D.H. testified that she had an inconclusive MRI performed, and thus, was referred to respondent by her chiropractor for additional scans on her shoulder. She would not have gotten the bone scan had she know it would only show abnormalities not the cause of her pain. Respondent asked her questions, but did not perform a physical examination. She was charged, however, $265 for a limited focused history and physical examination. Respondent advised her that it would be expensive and insurance would not cover the estimated $8,000, but not to worry because she could pay him back in installments. A bill collector, however, contacted her a few weeks after insurance covered its portion requesting the payment.

¶ 10 The Department's medical expert Dr. Charles E. Neal, M.D. testified that he was board certified in radiology and nuclear radiology and was a clinical radiology professor at Southern Illinois University. Respondent's counsel then moved for *voir dire*, and on cross-examination, Dr. Neal testified that he had never worked in a facility where there was a single physician who owned all of the equipment and operated the facility by himself. Respondent's counsel then objected to Dr. Neal's testimony contending that since Dr. Neal had no experience in a small "solo-practice-type" facility he should be disqualified because the court must look at the same community for determining whether an expert was qualified to testify. Nonetheless, the ALJ allowed the testimony and Department's counsel qualified him in the field of nuclear medicine against objection.

¶ 11 On redirect examination, Dr. Neal testified that the bone scan was unnecessary because in his opinion it was "outside the standard of care to recommend a bone scan if you know there's been an MRI done that didn't show" the cause of the patient's pain. Further, it was not standard practice to perform a limited history and physical examination before a bone scan. Furthermore, it was not customary to use analogue imaging when digital imaging produces a more sophisticated image. In fact, analogue cameras were generally no longer used in clinical and hospital settings because they did not meet the standards of care. Based on standard billing practices in the nuclear medicine community, Dr. Neil believed it was inappropriate for respondent to charge D.H. for duplicate services as well as the limited history and physical examination.

¶ 12 Respondent's expert Dr. Ernest Fordham, M.D., board certified in radiology and nuclear medicine, testified that it was customary to perform a full body scan and history on a referral patient because pain in one area of the body can result from an abnormality in another. On cross-examination, Dr. Fordham noted that it was not his practice to take both digital and analogue imaging. He also stated that his "personal bias [was] you charge for the bone scan, and that's it. And do whatever [was] necessary" for your patient. Dr. Fordham did not do any patient billing and retired in 1997 with limited experience in digital imagining.

¶ 13 On April 11, 2013, the ALJ submitted its report and recommendations to the Board. The ALJ concluded that the Department failed to prove Count I, but did, however, prove by clear and convincing evidence the allegations contained in Count III. Specifically, respondent beached his responsibility to D.H. in violation of 225 ILCS 60/22(A)(5) (West 2012), by billing D.H. for a limited history and physical examination in conjunction with a bone scan based on Dr. Neil's testimony which was undisputed by Dr. Fordham. The ALJ further observed that even though

BCBS paid for part of the limited history and physical examination, it was not determinative of whether respondent breached his responsibility to D.H. in charging $265 for a service incident to a bone scan. Further, the ALJ determined that the Department proved by clear and convincing evidence the allegations contained in Count IV; namely that respondent breached his responsibility to D.H. in violation of 225 ILCS 60/22(A)(5) and (6) (West 2012), by taking and charging D.H. for duplicative imaging. The ALJ observed that respondent could not provide any instance where an analogue study could produce information that a digital image could not, despite being asked numerous times. Therefore, the ALJ recommended that the Board reprimand respondent and assess a fine of $2,500.

¶ 14 On May 15, 2013, the Board adopted the ALJ's findings of fact and conclusions of law, but recommended a $10,000 fine because of "the serious nature" of respondent's violations that "shall be paid within 60 days of the effective date of the Director's order." Thereafter, the Director adopted the Board's decision, but the order did not require payment within 60 days. Respondent then filed a complaint for administrative review and the circuit court affirmed the Department's decision. Consequently, respondent filed this timely appeal.

¶ 15 ANALYSIS

¶ 16 In an appeal from the judgment of an administrative review proceeding, we review the decision of the administrative agency, not the decision of the circuit court. *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 272 (2009). The applicable standard of review depends on whether the question presented is one of fact, one of law, or a mixed question of fact and law. *Kazmi v. Department of Financial and Professional Regulation*, 2014 IL App (1st) 130959, ¶ 18. When a purely legal issue is raised, we review *de novo*. *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 525 (2008). When the issue raised is one of fact, we

will only ascertain whether such findings of fact are against the manifest weight of the evidence. *Provena Covenant Medical Center v. Department of Revenue*, 236 Ill. 2d 368, 386-87, 339 (2010). In turn, the Director's decision on the legal effect of a given set of facts, such as whether respondent's conduct constituted a violation of the Act, presents a mixed question of law and fact and is reviewed under the clearly erroneous standard. *Parikh v. Division of Professional Regulation of Department of Financial and Professional Regulation*, 2014 IL App (1st) 123319, ¶ 30. The clearly erroneous standard of review lies between the manifest weight of the evidence standard and the *de novo* standard, and lends some deference to the agency's decision. *Dow Chemical Co. v. Department of Revenue*, 359 Ill. App. 3d 1, 22 (2005). The Department's decision will be deemed clearly erroneous only where, upon review of the entire record, we are "left with the definite and firm conviction that a mistake has been committed." *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 393 (2001).

¶ 17 Respondent first contends the ALJ erred in allowing Dr. Neal to testify as a medical expert because he did not meet the prerequisite showing that he was familiar with the methods observed by nuclear medicine physicians working in solo practices. To qualify as an expert in the medical field, the witness must be a licensed member of the school of medicine about which he intends to testify and he must be familiar with the methods, procedures, and treatments ordinarily observed in the defendant's community or similar community. *Ruiz v. City of Chicago*, 366 Ill. App. 3d 947, 953 (2006). Once the former requirement has been satisfied, "it lies within the sound discretion of the trial court to determine if the witness is qualified and competent to state his opinion as an expert regarding the standard of care." *Purtill v. Hess*, 111 Ill. 2d 229, 243 (1986). Therefore, an administrative agency's decision regarding the conduct of its hearing and the admission of evidence is governed by an abuse of discretion standard and is

subject to reversal only if there is demonstrable prejudice to the complaining party. *Matos v. Cook County Sheriff's Merit Board*, 401 Ill. App. 3d 536, 541 (2010).

¶ 18 In this case, Dr. Neal was board certified in diagnostic radiology and nuclear radiology, trained in all imaging modalities, including nuclear medicine. It is disingenuous for respondent to continuously emphasize that since Dr. Neal is "a radiologist" he is nonetheless unfamiliar with nuclear medicine, an area of medicine he had practiced at least 25 years in both large and small hospitals. In addition, although Dr. Neil has never practiced as a solo-practitioner, that does not disqualify him from testifying to the standard of care in the overall nuclear medicine community and respondent cites authority in support of any contrary position. See Ill. Sup. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (argument portion of brief shall contain the contentions of the appellant and the reasons therefore with citations to authority, and points not argued are waived); *TruServ Corp. v. Ernst & Young*, LLP, 376 Ill. App. 3d 218, 227 (2007). Further, there is no evidence in the record suggesting that Dr. Neal made legal conclusions for which the ALJ based his determinations. Dr. Neal simply gave his opinions as to what was the standard in his practice area based on his knowledge and experience. Furthermore, the record demonstrates that the ALJ based his determinations on a variety of evidence. For instance, the ALJ observed that although Dr. Neal's testimony indicated that analogue and digital studies were duplicative, the ALJ was swayed by respondent's failure to provide any instance where an analogue study could produce information that a digital image could not. The ALJ, as the tier of fact, is in the best position "to evaluate all evidence, judge the credibility of witnesses, resolve any conflicts in the evidence, and draw reasonable inferences and conclusions from the facts." *Morgan v. Department of Financial and Professional Regulation*, 388 Ill. App. 3d 633, 658 (2009). Accordingly, will not

substitute our judgment for the ALJ on these matters, and thus on this record, we find no abuse of discretion.

¶ 19 Respondent also contends that since BCBS made partial payment on D.H.'s treatment that the bill was *prima facie* reasonable. When evidence is admitted that a medical bill was for treatment rendered and the bill has been paid, the bill is *prima facie* reasonable. *Arthur v. Catour*, 216 Ill. 2d 72, 82 (2005). One method of establishing the reasonableness of medical expenses, however, is the testimony of parties having knowledge of the services rendered and the reasonableness of the charges. *Diaz v. Chicago Transit Authority*, 174 Ill. App. 3d 396, 405 (1988). Here, Dr. Neal testified that, based on standard billing practices in the nuclear medicine community, it was inappropriate for respondent to charge D.H. for duplicate services as well as the limited history and physical examination. Respondent's expert Dr. Fordham had limited experience in billing patients, but his testimony suggested he would not have charged for the duplicative study or physical examination. Further, the ALJ did not consider BCBS's coverage determinative, and again, we defer to the ALJ's findings on the credibility of witnesses and weighing of the evidence. See *People v. Sullivan*, 366 Ill. App. 3d 770, 782 (2006) (the trier of fact may accept or reject as much or as little of a witness's testimony and the evidence as he pleases). In addition, we observe that BCBS only covered a small portion (28%) of D.H.'s bill, which does not conclusively suggest the entire bill was reasonable. Therefore, the ALJ's finding was not against the manifest weight of the evidence.

¶ 20 Respondent next contends that the ALJ deprived him of a fair hearing by requiring his expert Dr. Hellman to present live testimony. Our supreme court has continuously held that the strict rules of evidence that apply in a judicial proceeding do not apply in proceedings before an administrative agency. *Ivy v. Illinois State Police*, 263 Ill. App. 3d 12, 19 (1994). Further, an

administrative agency's decision regarding the admission of evidence is discretionary and should not be disturbed on review absent an abuse of discretion. *MJ Ontario, Inc. v. Daley*, 371 Ill. App. 3d 140, 149 (2007).

¶ 21 We cannot say the ALJ abused his discretion. After discovery had closed, the ALJ allowed defendant to substitute Dr. Hellman for his original expert and even rescheduled the second day of the hearing to allow for his presence in court. Subsequently, at the hearing, respondent asked the ALJ permission to take an evidence deposition of Dr. Hellman in his Wisconsin offices because he was unable to travel to Chicago. The ALJ denied respondent's request because he felt that judicial economy necessitated Dr. Hellman be present in court to judge his credibility and make appropriate rulings. The ALJ did allow for a continuance to produce Dr. Hellman, but he was never called at a later date. Thus, we fail to see how respondent's rights to due process were violated. See *Sheehan v. Board of Fire and Police Com'rs of City of Des Plaines*, 158 Ill. App. 3d 275, 284 (1987) (the respondent's rights to due process were not violated when he "received notice of the charges and enjoyed a hearing before an impartial tribunal at which he was represented by counsel and was allowed to cross-examine witnesses, present evidence in his own defense and inspect documentary evidence against him). The ALJ's requirement that Dr. Hellman testify in person was not unreasonable and respondent was given ample opportunity to produce his expert.

¶ 22 Respondent further contends that the Department imposed an improper sanction payable within 60 days from the final judgment. Even if the administrative decision is determined to be correct under the foregoing standards of review, the sanction imposed by the agency may still be reversed if it amounts to an abuse of discretion. *Kazmi*, 2014 IL App (1st) 130959, ¶ 21. A sanction will be found to be an abuse of discretion if it is either: (1) overly harsh in view of the

mitigating circumstances or (2) if it is arbitrary and capricious. *Kafin v. Division of Professional Regulation of the Department of Financial & Professional Regulation*, 2012 IL App (1st) 111875, ¶ 42. A "reviewing court defers to the administrative agency's expertise and experience in determining what sanction is appropriate to protect the public interest." *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 99 (1992).

¶ 23 Under section 60/22 (A), in pertinent part, the Department:

> "may revoke, suspend, place on probation, reprimand, refuse to issue or renew, or take any other disciplinary or non-disciplinary action as the Department may deem proper with regard to the license or permit of any person issued under this Act, including imposing fines not to exceed $10,000 for each violation, upon any of the following grounds:
>
> (5) Engaging in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public.
>
> (6) Obtaining any fee by fraud, deceit, or misrepresentation." 225 ILCS 60/22 (A)(5), (6) (West 2012).

¶ 24 Therefore, the Department was at liberty to impose the maximum sanction on respondent. And although respondent alleges that his conduct was not "as serious" compared to the other cases where this sanction was imposed, as a reviewing court we must defer to the administrative agency's expertise in determining what sanction is appropriate. See *Abrahamson*, 153 Ill. 2d at 99. Given the evidence presented in this case, it was not unreasonable for the Department to determine that respondent's conduct was so egregious that it was likely "to deceive, defraud or harm the public" and impose the maximum sanction. In addition, respondent provides no evidence of mitigating circumstances or a proposition of law suggesting that the Department was

required to explain its basis for the sanction. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Sakellariadis v. Campbell*, 391 Ill. App. 3d 795, 804 (2009) (this court has held that the failure to elaborate on an argument or cite persuasive and relevant authority results in waiver of that argument). Furthermore, contrary to respondent's assertion, the Director did not adopt the Board's suggestion that payment be made within 60 days. Therefore, we cannot say the Department abused its discretion.

¶ 25 Finally, respondent contends that the ALJ erred in allowing into evidence his prior disciplinary sanction. Again, the admittance of evidence was purely at the ALJ's discretion and there is no suggestion that the ALJ based his findings on respondent's prior sanction. See *Ellison v. Illinois Racing Board.*, 377 Ill. App. 3d 433, 443 (2007) (administrative agencies are not bound by the strict rules of evidence that apply in a judicial proceeding and the admission of evidence in such a hearing is purely discretionary). Consequently, respondent was not prejudiced.

¶ 26 CONCLUSION

¶ 27 Based on the foregoing, we affirm the decision of the Board.

¶ 28 Affirmed.