2017 IL App (1st) 162867-U

FIRST DIVISION
December 4, 2017

No. 1-16-2867

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN DOE ONE,	)	Appeal from the Circuit Court of
	)	Cook County, Chancery Division
Plaintiff-Appellee,	)	
	)	
v.	)	No. 15 CH 16763
	)	
ILLINOIS DEPARTMENT OF PUBLIC HEALTH	)	
and NIRAV D. SHAH, M.D., J.D., DIRECTOR,	)	
	)	Honorable Anna Helen Demacopoulos
Defendant-Appellant.	)	Judge Presiding

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court had subject matter jurisdiction. The statutory amendment at issue applies prospectively only. The Director of the Department of Public Health applied the wrong standard when he evaluated and denied plaintiff's petition.

¶ 2 BACKGROUND

¶ 3 John Doe One petitioned the Illinois Department of Public Health to classify Irritable Bowel Syndrome as a debilitating medical condition so that a person afflicted with the condition could apply to use medical cannabis under the Compassionate Use of Medical Cannabis Pilot Program Act (410 ILCS 130/1 et seq.) (West 2014). By a 10 to 0 vote following a hearing, the

Medical Cannabis Advisory Board, issued a recommended decision to approve Doe's petition. The matter then moved to the Director of the Department of Public Health. The Director rejected the Board's recommendation and denied Doe's petition. The Director conducted his own research to reach his decision. The Director found that "there is not substantial evidence from adequate, well-controlled clinical trials to support the use of cannabis in the setting of irritable bowel syndrome" and that "the safety and efficacy of cannabis for this medical condition cannot be assured." Doe filed a complaint for judicial review in the circuit court.

¶ 4 During the time the case was pending in the circuit court, the relevant statute was amended and the process for getting new conditions added to the list of approved uses for medical cannabis changed. The amendment to the Act essentially eliminated the role of the Board. The circuit court went on to find that Doe's due process rights were violated because the Director of the Department of Public Health considered his own research and did not give Doe an opportunity to respond to or rebut the counterevidence. The circuit court also found that the Director applied the wrong standard when evaluating the petition and the evidence. As a result, the trial court reversed the Director's decision and sent the case back to the Board so it could consider the evidence that the Director relied upon but that was not before the Board when the Board issued its recommended decision.

¶ 5 The Department of Public Health and its Director filed a motion to reconsider arguing that the amendment to the Act required a decision in their favor. The circuit court denied the motion to reconsider, finding that the amendment applied prospectively only. The circuit court also went a step further than its initial order and did away with remanding the case to the Board because the Board had been disbanded by the amendment to the Act. The circuit court issued a final decision ordering the Department and the Director to add IBS to the list of debilitating

medical conditions within 14 days of the order being entered. We granted the Department and the Director a stay pending appeal.

¶ 6 ANALYSIS

¶ 7 At the outset, we note that this case is nearly identical to *Doe Three v. Department of Public Health*, 2017 IL App (1st) 162548 (appeal denied sub nom. No. 122391, Ill. Nov. 22, 2017). In fact, even the trial court in that case ruled in almost the exact same manner by initially remanding the case and subsequently reversing the Director outright. See *id.* at ¶ 3. The Director, by letter dated the same day, denied the petitions in both matters using identical language. See *id.* at ¶ 7. In the appeal in that case and in the appeal in this case, the Department and Director interpose arguments: (1) that the circuit court lacked subject matter jurisdiction; (2) that the Director's decision should stand because he applied the proper standard and can consider evidence not introduced at the hearing; and (3) that the amendments to the statute should apply retroactively. *Id.* at ¶ 3.

¶ 8 We agree with and reaffirm our holding in that case—that the circuit court had subject matter jurisdiction, and that the amendments to the Act apply prospectively, but that the Director applied the improper standard when evaluating the evidence and making his ruling. *Id.* at ¶ 39.

¶ 9 The Department and the Director argue that the circuit court did not have jurisdiction. They acknowledge that they did not raise this issue below, but rightly point out that an argument that the court lacks subject matter jurisdiction may be raised at any time, even for the first time on appeal. *Village of Maywood Board of Fire & Police Commissioners v. Dep't of Human Rights of State of Illinois*, 296 Ill. App. 3d 570, 575 (1998).

¶ 10 The Department and the Director maintain that Doe brought his action for review based on section 45 of the Act, and that section 45 does not adopt the Administrative Review Law on

which Doe claims subject matter jurisdiction is based. But section 155 of the same Act states that *"[a]ll final administrative decisions of the Departments of Public Health* *** are subject to direct judicial review under the provisions of the Administrative Review Law and the rules adopted under that Law (emphasis added)." 410 ILCS 130/155 (West 2016). And even the section at issue states that "[t]he approval or denial of any petition [to add debilitating conditions] *is a final decision of the Department*, subject to judicial review. Jurisdiction and venue are vested in the Circuit Court." (Emphasis added.) 410 ILCS 130/45(a) (West 2016). It is clear that the legislature intended applicants to have judicial review of administrative decisions about whether to add a debilitating medical condition to the list and to have that review in the circuit court. And the Administrative Review Law is the proper law to apply for the challenges made here. See *Doe Three*, 2017 IL App (1st) 162548, ¶ 20. The Department and the Director fail to provide any persuasive reason for holding otherwise.

¶ 11 In an effort to make things more clear, we next address the Department and the Director's argument that the June 30, 2016 amendment should control the circuit court's decision because the circuit court did not rule until July 26, 2016. The Department and the Director argue that amended Act and regulations should apply retroactively to Doe's petition. At the time Doe filed his petition, the process for adding debilitating medical conditions was set forth in the original 2014 version of section 45 of the Act. 410 ILCS 130/45 (West 2014). That statutory section has been amended three times since its enactment. The original section was complimented with a regulation that set forth the process for adding a condition to the Act. See 77 Ill. Admin Code § 946.30 (39 Ill. Reg. 7712, effective May 15, 2015). A rather lengthy amendment was added to the Act that became effective June 30, 2016. The administrative regulation was also updated to supplement the Act, as amended.

¶ 12 After the amendment went into effect, the Act and Public Health Administrative Regulation 946.30 no longer provide that the Medical Cannabis Advisory Board hold hearings or make recommendations to the Director for adding debilitating medical conditions. The amendments eliminate the role of the Board as the psuedo gatekeeper for the process. Compare 410 ILCS 130/45 (P.A. 98-122, § 45, eff. Jan. 1, 2014) (West 2014) with 410 ILCS 130/45 (P.A. 99-519, § 5, eff. June 30, 2016) (West 2016) and 77 Ill. Adm. Code § 946.30 (West 2016). In its current iteration, the Act and the corresponding administrative regulation provide that the Director will consult with the Department staff and then issue final decisions on whether to approve a petition and add a debilitating medical condition under the Act. 77 Ill. Admin. Code § 946.30(e) (West 2016).

¶ 13 As we have previously held, the changes made by the amendments "are substantive in nature as they most certainly create different rights of the petitioner than existed before." *Doe Three*, 2017 IL App (1st) 162548, ¶ 36. The current regulation also states that "[a]ll petitions to add debilitating conditions submitted to the Department in January 2016 will be reviewed in accordance with the rules for the addition of debilitating medical conditions in effect at the time of the submission." 77 Ill. Admin. Code § 946.30(g). The reason January 2016 is the only date listed is because the Act sets up a period from January 1 to January 31 each year for residents to file petitions. So that means that even petitions submitted in January 2016 were to be reviewed under the then-in-effect rules, and those submitted after the amendment's effective date, June 30, 2016, would be reviewed under the new scheme. The intent that the application of the amendments be prospective only is clear. The petition in this matter was filed in March 2015, so the amendment does not apply and the Department and Director were required to review Doe's petition according to the rules for addition to the Act that were in effect before the Act was

amended.

¶ 14 After finding that the circuit court had subject matter jurisdiction and that the rules in effect before the Act was amended apply, we must address whether the trial court properly set aside the Director's decision and ordered that IBS be added as a debilitating medical condition under the Act. As a corollary, we must consider Doe's contentions that the Director improperly considered evidence outside of what was introduced at the hearing and that he applied the wrong standard when evaluating the evidence. Again, these issues were squarely addressed in *Doe Three*. See *Doe Three*, 2017 IL App (1st) 162548, ¶ 30.

¶ 15 The pre-amendment Act and its attendant administrative regulation, which apply here, provide that once the Department of Public Health finds that the petition meets the standards for submission, the Department will accept the petition for further review. 77 Ill. Admin. Code. § 946.30(g)(3)(A) (amended at 39 Ill. Reg. 7712, effective May 15, 2015). Then, the Board shall convene a public hearing to review all accepted petitions. 77 Ill. Admin. Code. § 946.30(j) (amended at 39 Ill. Reg. 7712, effective May 15, 2015). After taking evidence at the hearing, the Board "shall provide the Director a written report of findings recommending either the approval or denial of the petitioner's request." 77 Ill. Admin. Code. § 946.30(l) (amended at 39 Ill. Reg. 7712, effective May 15, 2015). "Upon review of the Advisory Board's recommendations, the Director will render a final decision regarding the acceptance or denial of the proposed debilitating medical conditions or diseases." 77 Ill. Admin. Code. § 946.30(m) (amended at 39 Ill. Reg. 7712, effective May 15, 2015).

¶ 16 It is undisputed that Doe's petition met the standards for submission and was accepted for further review. At the administrative hearing, Doe presented technical testimony from multiple medical professionals and presented articles setting forth opinions that cannabis was necessary or

beneficial for the treatment of IBS. The Board voted 10-0 to recommend IBS be added as a debilitating medical condition under the Act. After conducting his own research, however, the Director denied the petition finding that "there is not substantial evidence from adequate, well-controlled clinical trials to support the use of cannabis in the setting of irritable bowel syndrome." The Director further explained that based on his findings, "the safety and efficacy of cannabis for this medical condition cannot be assured." Accordingly, he denied Doe's petition. But the standard applied by the Director was not the standard set forth in the Act or in the attendant regulation. See *Doe Three*, 2017 IL App (1st) 162548, ¶ 30. The Director applied a higher standard of proof and persuasion than contemplated by the Act and by Department rule. Accordingly, as in *Doe Three*, the Director's decision cannot stand.

¶ 17 Doe's primary argument is that the trial court properly found that there was a due process violation, so its order overturning the Director's decision was correct. At that point the trial court had ordered that the matter be remanded to the Director so that he could apply the proper standard and consider the evidence presented while affording Doe the requisite due process protections. However, when denying the Director's motion to reconsider, the trial court issued an outright reversal and ordered that IBS be added to the list of debilitating medical conditions under the Compassionate Use of Medical Cannabis Pilot Program Act. Doe argues that we should also uphold that order.

¶ 18 The trial court accepted Doe's argument that it was impossible for the parties to comply with its remand order because the Medical Advisory Board had been disbanded. But the existence of the Medical Advisory Board is of no consequence here. Here, we have a situation where the Board already voted 10-0 to add IBS to the list of debilitating medical conditions. The Board's recommendation still exists. Doe's petition and the supporting evidence still exist. The

matter is in the hands of the Director consistent with the Act as it was before the 2015 amendment. There is no reason that Doe cannot receive adequate due process protections when the issue is considered by the Director on remand. And Doe provides no authority or any reasoned basis to support the trial court's decision to outright order that a condition be added to the list of debilitating medical conditions as the result of a due process violation.

¶ 19 Accordingly, as in *Doe Three*, we affirm the part of the circuit court's judgment that reversed the Director's denial of plaintiff's petition, but reverse the part of the judgment ordering that the condition be added by rule. See *Doe Three*, 2017 IL App (1st) 162548, ¶ 39. We remand to the Director for consideration in accordance with the preamendment Act and accompanying Department rule.

¶ 20 CONCLUSION

¶ 21 Affirmed in part, reversed in part.

¶ 22 Cause remanded to the Director of the Department of Public Health.