

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Monica M. Wloszek, D.C.,	:	
Appellant-Appellant,	:	No. 12AP-529
v.	:	(C.P.C. No. 11CVF-15826)
Ohio Bureau of Workers' Compensation,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on March 5, 2013

Reminger Co., L.P.A., Melvin J. Davis and Ronald A. Fresco,
for appellant.

Michael DeWine, Attorney General, and Patsy A. Thomas,
for appellee.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Appellant-appellant, Monica M. Wloszek, D.C. ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas affirming an order issued by appellee-appellee, Ohio Bureau of Workers' Compensation ("BWC"), denying appellant's application for certification to participate in the BWC's Health Partnership Program ("HPP"). Because we conclude that applying the relevant administrative rule to bar appellant from being certified in the HPP does not violate her right to substantive due process and that the BWC did not err by considering the sealed records related to appellant's criminal convictions in denying her application, we affirm.

{¶ 2} Appellant is a chiropractor and is licensed to practice in the state of Ohio. In 2000, appellant pled guilty in a federal criminal case to two felony charges based on violations of a federal "anti-kickback" statute. Appellant later applied to the Cuyahoga

County Court of Common Pleas for an order sealing the records pertaining to those convictions. The court issued an order sealing those records in 2007.

{¶ 3} In 2009, appellant applied for certification as a provider in the HPP, a comprehensive managed care program administered by the BWC to provide medical services to employees for their compensable work-related injuries or occupational diseases. Appellant had previously been certified as a provider in the HPP, but the BWC revoked her certification under a rule requiring that a certified provider shall not have a history of a felony conviction in any jurisdiction or a conviction for an act involving dishonesty, fraud or misrepresentation. Ohio Adm.Code 4123-6-02.2(B)(5).¹ The BWC denied appellant's 2009 application for certification in the HPP. Appellant appealed the denial, and a hearing was conducted before a BWC referee. Following the hearing, the BWC issued an order adopting the referee's findings of fact and conclusions of law, as well as his recommendation that appellant's application for certification be denied. The BWC concluded that appellant failed to comply with the rules governing the HPP based on her prior felony convictions and that it lacked discretion to consider mitigating evidence related to those convictions. The BWC also concluded that it could consider the sealed records related to appellant's criminal convictions because the convictions bore a direct and substantial relationship to certification as an HPP provider.

{¶ 4} Appellant appealed the BWC's order to the Franklin County Court of Common Pleas. The court affirmed the order, concluding that it was supported by reliable, probative, and substantial evidence and was in accordance with law.

{¶ 5} Appellant appeals from the judgment, assigning two errors for this court's review:

¹ Appellant was a certified provider in the HPP at the time she pled guilty to the federal criminal charges. In November 2000, the BWC notified appellant that it intended to revoke her certification based on the convictions resulting from her guilty plea. Following an appeal and hearing before a BWC referee, the BWC ordered that appellant remain certified in the HPP based on the mitigating evidence that she presented. Appellant was subsequently recertified in the HPP under the BWC's rules providing for recertification every two years. In May 2006, the BWC once again notified appellant of its intention to revoke her certification. Appellant appealed this decision, and a hearing was conducted before a BWC referee. The BWC ultimately revoked appellant's certification in an August 2008 order due to her prior convictions. In the August 2008 order, the BWC concluded that it lacked discretion to consider appellant's mitigating evidence, citing this court's decisions in *Gralewski v. Bur. of Workers' Comp.*, 167 Ohio App.3d 468, 2006-Ohio-1529 (10th Dist.) and *Kistler v. Bur. of Workers' Comp.*, 10th Dist. No. 04AP-1095, 2006-Ohio-3308. Appellant thereafter filed a new application for certification, which is the subject of the present appeal.

(1) The trial court's Decision affirming the Bureau of Worker's Compensation's Order denying Dr. Monica Wloszek's application to participate in the Health Partnership Program is clearly wrong as a matter of law because Ohio Adm. Code 4123-6-02.2(B)(5), as applied to the facts of this case, violates Dr. Wloszek's substantive due process rights.

(2) The trial court's Decision affirming the Bureau of Workers' Compensation Order denying Dr. Monica Wloszek's application to participate in the Health Partnership Program is clearly wrong as a matter of law because the use of, and reference to Dr. Wloszek's criminal records, which were properly sealed, violated R.C. 2953.33(B).

{¶ 6} In an administrative appeal under R.C. 119.12, a common pleas court reviews the entire record and determines whether an agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. *Leslie v. Ohio Dept. of Dev.*, 171 Ohio App.3d 55, 2007-Ohio-1170 (10th Dist.), ¶ 43, citing *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 110-11 (1980). On appeal from a determination by the common pleas court that an agency's order was supported by reliable, probative, and substantial evidence, this court reviews the lower court's decision for abuse of discretion. *Leslie* at ¶ 44. An abuse of discretion occurs where a court's decision is "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). "However, on the question of whether the agency's order was in accordance with law, this court's review is plenary." *Leslie* at ¶ 44, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343 (1992).

{¶ 7} In appellant's first assignment of error, she argues that applying Ohio Adm.Code 4123-6-02.2(B)(5) to prohibit her from being certified as a provider in the HPP violates her substantive due process rights. "The essence of substantive due process is the protection from certain arbitrary, wrongful governmental actions irrespective of the fairness of the procedures used to implement them." *Kistler v. Bur. of Workers' Comp.*, 10th Dist. No. 04AP-1095, 2006-Ohio-3308, ¶ 14. When a constitutionally protected right is not implicated, courts apply a rational-basis test in determining a substantive due process challenge. *Id.* at ¶ 17. Under a rational-basis test, a rule is constitutional if it

bears a rational relationship to a legitimate state interest and is not arbitrary, discriminatory, capricious or unreasonable. *Id.*

{¶ 8} This court has previously considered the constitutionality of Ohio Adm.Code 4123-6-02.2(B)(5) and its application in similar situations in two prior cases. The first case involved a chiropractor, Dr. Gralewski, who pled guilty to one count of false pretenses in a state case in 1992 and pled guilty to one count of felony mail fraud in a federal case in 1993, based on his participation in an unlawful referral scheme that involved fraudulent billing of an insurance company. *Gralewski v. Bur. of Workers' Comp.*, 167 Ohio App.3d 468, 2006-Ohio-1529, ¶ 2 (10th Dist.). As a result of the guilty plea, his medical licenses in Michigan and Ohio were temporarily suspended. *Id.* at ¶ 3. In 1996, Dr. Gralewski applied for certification in the HPP and was certified as a provider under that program. He was later recertified in 2000. In both the initial application and the application for recertification, Dr. Gralewski disclosed his prior convictions. *Id.* at ¶ 6. Dr. Gralewski again applied for recertification in 2002. In response, the BWC notified him that it intended to revoke his certification based on his prior felony convictions. *Id.* Following a hearing, a referee recommended that Dr. Gralewski be recertified, but the BWC administrator rejected this recommendation and denied the application for recertification. *Id.* at ¶ 8-9. Dr. Gralewski appealed to the Franklin County Court of Common Pleas, which held that the BWC had acted arbitrarily and capriciously, and reversed the BWC's order. *Id.* at ¶ 11-12. Both parties appealed to this court.

{¶ 9} On appeal, this court concluded that the language of Ohio Adm.Code 4123-6-02.2(B)(5) was clear and unambiguous in providing that, to be certified in the HPP, a provider must not have a history of a felony conviction or a conviction for any act involving dishonesty, fraud or misrepresentation. *Id.* at ¶ 20. Accordingly, the BWC was authorized to decertify Dr. Gralewski. *Id.* at ¶ 21. The court also concluded that the rule did not contain any provisions for the BWC to consider mitigating circumstances. *Id.* at ¶ 22. The court reversed the common pleas court's ruling and directed it to enter an order affirming the BWC's order denying Dr. Gralewski's application. *Id.* at ¶ 63.

{¶ 10} Shortly after the *Gralewski* decision, this court once again considered the application of Ohio Adm.Code 4123-6-02.2(B)(5) in the *Kistler* case. The physician in that case, Dr. Kistler, pled guilty in 1981 to one felony count of conspiring to defraud

insurance companies by submitting false and inflated medical bills. *Kistler* at ¶ 2. Despite the conviction, Dr. Kistler retained his medical licenses in Ohio and Florida. *Id.* In 1996, the BWC certified Dr. Kistler as an HPP provider, and it recertified him in 2002. *Id.* at ¶ 5. Then, in 2003, the BWC notified Dr. Kistler that his recertification was in error and that it planned to revoke the certification based on his prior conviction. *Id.* at ¶ 6. Following a hearing, the BWC revoked the certification, concluding that Dr. Kistler could not be certified under Ohio Adm.Code 4123-6-02.2(B)(5) due to his conviction in 1981. Dr. Kistler appealed to the Franklin County Court of Common Pleas, which reversed the BWC's order, finding that the rule violated his constitutional rights to due process and equal protection. *Id.*

{¶ 11} On appeal, this court noted that, under Ohio Adm.Code 4123-6-02.2(B)(5), the BWC has no discretion to certify a physician to participate in HPP once it is demonstrated that the physician has a felony conviction or a conviction for an act involving dishonesty, fraud or misrepresentation. *Id.* at ¶ 12, citing *Gralewski* at ¶ 22. We concluded that the state has legitimate interests in regulating the character, honesty, and business practices of its medical providers and in ensuring that payments from the state workers' compensation insurance fund do not go to convicted felons and those convicted of acts of fraud and dishonesty. *Kistler* at ¶ 18. Applying the rational-basis test, we concluded that Ohio Adm.Code 4123-6-02.2(B)(5) was rationally related to these legitimate state interests. *Id.* Considering the specific facts in *Kistler*, we concluded that Dr. Kistler's conviction "involve[d] fraud and directly relate[d] to his practice as a physician and to his professional judgment." *Id.* at ¶ 19. Accordingly, it was not arbitrary, capricious, discriminatory or unconscionable for the BWC to prohibit him from participating in HPP, even when the conviction occurred 25 years earlier and he had maintained his medical licenses. *Id.*

{¶ 12} We find that the present case is similar to *Gralewski* and *Kistler*, and we are guided by those prior decisions. In this case, appellant pled guilty to violating a federal "anti-kickback" statute that prohibits an individual from knowingly and willfully soliciting or receiving payments in return for referring an individual to a person for services that may be paid for under a federal health care program. 42 USC 1320a-7b(b)(1). Appellant also pled guilty to conspiring to violate the anti-kickback statute. As set forth in the plea

agreement, appellant admitted to receiving "rent" payments from a mobile-medical laboratory business for use of a room in appellant's office. However, these rent payments exceeded fair market value and were actually remuneration to appellant for referring Medicare and Medicaid patients to the mobile-medical laboratory business for diagnostic testing and for ordering tests for those patients from the mobile-medical laboratory business. The plea agreement indicated that the hourly rental payments appellant received were directly related to the number of referrals she made.

{¶ 13} Appellant argues that her case is distinguishable from *Gralewski* and *Kistler* because she was not convicted of fraud. We reject this distinction. The prohibition contained in Ohio Adm.Code 4123-6-02.2(B)(5) is not limited to convictions for fraud; the relevant clause also bars those convicted of acts involving dishonesty or misrepresentation. Moreover, we note that the rule also bars individuals who have been convicted of a misdemeanor committed in the course of practice or involving moral turpitude. Although that clause does not apply to appellant because she pled guilty to felony charges, it demonstrates that the rule encompasses those who have been convicted for improper acts related to their professional judgment. Appellant's conviction was not based on fraudulent billing like the circumstances in *Gralewski* and *Kistler*, but the events leading to her conviction were directly related to the conduct of her medical practice and to her exercise of professional judgment. Appellant's plea agreement explained that she knowingly and willfully entered into a business arrangement in which she received excess compensation for referring patients to a specific company for medical tests. As explained in *Kistler*, "[t]he state has a legitimate interest in regulating the character, honesty, and business practices of its medical providers." *Kistler* at ¶ 18. Under these circumstances, the application of the rule to appellant has a rational relationship to this legitimate state interest. Moreover, it is not arbitrary, discriminatory, capricious or unreasonable for the BWC to prevent a physician convicted of these charges from participating in the HPP.

{¶ 14} Ohio Adm.Code 4123-6-02.2(B)(5) bears a rational relationship to legitimate state interests and is not arbitrary, capricious, discriminatory or unconscionable as applied to appellant. Therefore, the rule does not violate appellant's rights to substantive due process. Appellant's first assignment of error is without merit and is overruled.

{¶ 15} In appellant's second assignment of error, she asserts that the BWC and the lower court could not consider the plea agreement and judgment entry from her criminal case. In February 2007, the Cuyahoga County Court of Common Pleas issued an order sealing appellant's conviction records pursuant to R.C. 2953.32. Appellant argues that the BWC and the lower court ignored that order and erred by considering the plea agreement and judgment entry.

{¶ 16} Under R.C. 2953.32, an eligible offender may apply for the sealing of a conviction record. If the criteria for sealing a case are met, "[t]he proceedings in the case shall be considered not to have occurred and the conviction * * * shall be sealed." R.C. 2953.32(C)(2). However, the sealing of records does not prohibit the use of sealed records in every situation. *Kistler* at ¶ 38, citing *Szep v. Ohio State Bd. of Pharmacy*, 106 Ohio App.3d 621, 623 (11th Dist.1995). R.C. 2953.33(B)(1) provides that an applicant for employment, a license or another right or privilege, may be questioned about a sealed conviction when "the question bears a direct and substantial relationship to the position for which the person is being considered."

{¶ 17} In this case, appellant applied for certification under the HPP. This constitutes a privilege for which appellant applied, implicating the exception under R.C. 2953.33(B)(1). *Kistler* at ¶ 38. Appellant argues that, under R.C. 2953.33(B)(1), the BWC was limited to questioning her about the conviction and could not consider the records from the case. In *Kistler*, the physician's conviction records had also been sealed, and he similarly claimed that the BWC erred by considering those records. *Id.* at ¶ 37. We rejected that argument, concluding that the conviction had a direct and substantial relationship to HPP certification and that, therefore, the BWC could consider the sealed conviction to determine whether he was qualified for HPP certification. *Id.* at ¶ 39-41. In this case, as explained above, appellant's conviction implicated her professional judgment and conduct of her medical practice. Thus, it bears a direct and substantial relationship to her attempt to become certified to participate in the HPP and receive payments from the BWC under that program. Moreover, we reject appellant's contention that the BWC was limited to questioning her about the conviction. This interpretation of the statute would allow the BWC to only hear appellant's version of the conviction and would prohibit the BWC from gathering additional information to make a proper determination on her

application. *See Szep* at 626 ("Under appellant's interpretation of [R.C. 2953.33(B)], the board would be allowed to hear only one version of the conviction, *i.e.*, his version of the conviction. Such an interpretation is inconsistent with the general legal axiom that a tribunal is more apt to render a proper decision following an adversarial proceeding, in which each party has an opportunity to present its side of an issue.").

{¶ 18} Because appellant's conviction bears a direct and substantial relationship to her certification as an HPP provider, the BWC properly considered the sealed records related to her conviction to determine whether she was qualified for certification. Appellant's second assignment of error is without merit and is overruled.

{¶ 19} For the foregoing reasons, we overrule both of appellant's assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
