No. 22792: Shakuntala Modi, M.D. v. West Virginia Board of Medicine

Workman, J., concurring:

Justice Albright has written what is in many respects an excellent opinion. Perhaps the most important contribution the opinion makes to the law is its clear enunciation that when the Board of Medicine departs from its hearing examiner's findings of fact and conclusions of law, it must craft an order that gives a reasoned, articulate statement of its reasons.[1]

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[1]Syllabus point five of the majority opinion gives the Board a broader scope of review with regard to findings of fact than has been accorded other administrative agencies. Generally, "[e]videntiary findings made [by a hearing examiner] at an administrative hearing should not be reversed unless they are clearly wrong." Randolph

It is inarguable that the manner in which the Board's order was fashioned made it almost impossible to discern their reasoning. As a result, I am unable to conclude from that order, as did the majority,

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County Bd. of Educ. v. Scalia, 182 W. Va. 289, 292, 387 S.E.2d 524, 527 (1989); see generally Syl. Pt. 5, Frymier-Halloran v. Paige, 193 W. Va. 687, 458 S.E.2d 780 (1995); Syl. Pt. 3, Butcher v. Gilmer County Bd. of Educ., 189 W. Va. 253, 429 S.E.2d 903 (1993); Syl., West Virginia Dep't of Health v. West Virginia Civil Serv. Comm'n, 178 W. Va. 237, 358 S.E.2d 798 (1987); Syl. Pt. 2, Vosberg v. Civil Serv. Comm'n, 166 W. Va. 488, 275 S.E.2d 640 (1981). However, 11 West Virginia Code of State Rules § 11-3-13.2 (1994) apparently confers more latitude to the Board in its review of a hearing examiner's findings of fact. That rule provides, in pertinent part, that "[t]he hearing examiner shall submit written findings of fact and conclusions of law to the Board pursuant to West Virginia code section three, article five, chapter twenty-nine-a, and the Board may adopt, modify or reject such findings of fact and conclusions of law." Id.; see Berlow v. West Virginia Bd. of Medicine, 193 W. Va. 666, 458 S.E.2d 469 (1995).

that the Board was arbitrary and capricious on the merits; but I agree with the majority that the matter should be remanded so the Board might have an opportunity to craft a reasoned, articulate order for us to review.

However, several points of clarification need to be made.

First, it should be emphasized that the majority opinion in no way ratified depossession therapy as a valid treatment recognized by reasonable, prudent physicians in the same specialty as being an accepted treatment.

Second, the majority concludes that the Board of Medicine "erroneously refused to consider, for whatever its probative value, the otherwise admissible testimony of experts supportive of Dr. Modi's assertion that depossession therapy is a recognized form of treatment and is not experimental." (Footnote omitted). In arriving at this conclusion, the majority correctly states that we have recently declared that Rule 702 of the West Virginia Rules of Evidence is the paramount authority governing the issue of the admissibility of expert testimony. See Mayhorn v. Logan Medical Found., 193 W. Va. 42, 454 S.E.2d 87 (1994). However, the Board's order is silent on whether they reversed the hearing examiner on the issue of the admissibility of the questionable experts, or whether they simply chose not to give any credence to their "expert" opinions. On remand, this

should be clarified. The Board should at least have an opportunity to make a clear conclusion on this issue before this Court rules as a matter of law (as the majority has) that the testimony in question was admissible under Rule 702.

Third, the majority finds the reasoning of the Board in determining the treatment in question to be experimental "flawed by the failure of the Board to give any consideration to the evidence adduced from Dr. Modi's experts and the failure of the Board to make appropriate findings of fact and conclusions of law[.]" Here, however, the Board did not reverse the hearing examiner. The hearing examiner did admit and consider the testimony of Dr. Modi's

experts, yet concluded that the treatment at issue constituted experimental therapy. The Board agreed.

Thus, it is difficult to see why the majority reversed on this segment of the Board's order, and even more difficult to understand why the majority directs that the entire issue of whether the treatment is experimental be re-opened and re-determined. Rather the majority should have been guided by the following well-established principle which we have consistently used in the context of other administrative appeals:

> '[A] reviewing court must evaluate the record of the agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is conducted pursuant to the administrative body's findings of fact, regardless

> of whether the court would have reached a different conclusion on the same facts. (Citation omitted.)'

CDS, Inc. v. Camper, 190 W. Va. 390, 392, 438 S.E.2d 570, 572 (quoting Frank's Shoe Store v. West Virginia Human Rights Comm'n, 179 W. Va. 53, 56, 365 S.E.2d 251, 254 (1986)) (alteration not in original); accord Syl. Pt. 1, Morris Memorial Convalescent Nursing Home, Inc. v. West Virginia Human Rights Comm'n, 189 W. Va. 314, 431 S.E.2d 353 (1993) (quoting Syl. Pt. 1, West Virginia Human Rights Comm'n v. United Transp. Union, Local No. 655, 167 W. Va. 282, 280 S.E.2d 653 (1981)) ("'West Virginia Human Rights Commission's findings of fact should be sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties.'").

Applying the above-mentioned concept to the present case, it becomes apparent that the hearing examiner listened to witnesses' testimony on both sides of the issue concerning whether depossession therapy is experimental in nature before evaluating that evidence and finding that the treatment was experimental. Moreover, the Board had the opportunity to review the substantial evidence presented to the hearing examiner in upholding the hearing examiner's finding. Consequently, said findings should be sustained by this Court, since the findings are supported by substantial evidence. By directing the Board to re-examine this issue, the majority fails to uphold the precise principle it has established for reviewing courts to utilize in cases where the findings are unquestionably supported by substantial

evidence. See id. This clearly does not constitute the kind of deference we previously said should be shown under the law to the expertise of both the hearing examiner and the Board below. See Syl. Pt. 3, Citizens Bank of Weirton v. West Virginia Bd. of Banking and Fin. Insts., 160 W. Va. 220, 233 S.E.2d 719 (1977).

Fourth, the majority itself expresses lack of understanding as to why the hearing examiner and the circuit court concluded that no written consent was necessary, in light of W. Va. Code 30-3-14(c)(14), which expressly requires "full, informed and written consent." Id. (emphasis added). Yet the majority goes on to criticize the Board for offering no explanation for its action "by which we might be enlightened." Here it seems rather obvious that the Board looked at the statute and followed it.

Fifth, I must respond to the gratuitous "guidance" offered by the majority with respect to the proper contents and form of a full, informed and written consent. The majority acknowledges that resolution of the issue of the content of such a consent involves complex issues of patient care and treatment, yet suggests that the Board might better deal with this matter by the issuance of a regulation rather than in a contested administrative proceeding. The majority's own reasoning seems, however, to bode against such an approach. Given the rapid advances in medicine in recent years, the complexity of individual medical questions, and the obvious tenor of the majority (with which I concur) that medicine must be at least willing to consider alternative, even experimental, therapeutic

approaches in determining what is and is not acceptable treatment, the creation of a regulation that would effectively resolve the issue of what constitutes a full informed consent in every context would be an almost impossible task.

Lastly, I address the majority's conclusion that the Board arbitrarily imposed the requirement that Dr. Modi submit to any insurance carrier for a patient undergoing depossession therapy a copy of the previously approved informed consent form signed by the subject patient. While I agree with the majority's conclusion, I want to clarify that, on remand, if it once again is determined that Dr. Modi's treatment is experimental, and not one recognized by reasonable, responsible physicians in the same specialty, then the Board might be well within its authority to determine that billing an

insurance company for psychotherapy could constitute a violation West Virginia Code § 30-3-14(c)(5), for which Dr. Modi could be disciplined. Specifically, West Virginia Code § 30-3-14(c)(5) provides, in pertinent part, that "[t]he board . . . may discipline a physician . . . licensed or otherwise lawfully practicing in this state who, after a hearing, has been adjudged by the board as unqualified due to any of the following reasons: . . . (5) Making or filing a report that the person knows to be false [(i.e. filing a claim for psychotherapy after a legal determination has been made that depossession therapy is experimental and does not fall within the accepted definition of psychotherapy)] . . . . Id. Thus, the Board could discipline Dr. Modi for such conduct; however, the sanction for such discipline must fall within the provisions of West

Virginia Code § 30-3-14(i). See supra note 11 of majority opinion. Simply stated, directing the method in which a physician must bill an insurance carrier is not an available sanction under West Virginia Code § 30-3-14(i), where the Board determines that a violation of West Virginia Code § 30-3-14(c)(5) occurred.

Consequently, while I disagree with some of the majority's reasoning and at least one of their primary bases for reversal (relating to the issue of experimental treatment and written consent), I concur in the opinion because I believe the Board failed to give a reasoned, articulate statement of the reasons for its amended findings and conclusions, and it should be required to do so.