

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION NO. 3

JAD H. RAMADAN,

Petitioner,

v.

Petition No. 19-AA-3
The Honorable Phillip D. Gaujot

ADAM HOLLEY¹, ACTING
COMMISSIONER, WEST VIRGINIA
DEPARTMENT OF MOTOR VEHICLES,

Respondent.

FINAL ORDER

On the 1st day of February, 2022, the above-captioned matter came before the Court for a final hearing on the Petitioner's appeal from the Final Order of the Office of Administrative Hearings ("OAH") entered September 19, 2019. The Petitioner, Jad H. Ramadan, appeared with his counsel, Charles C. Wise, III, Esq.; the Respondent, Everett J. Frazier, appeared by his counsel, Elaine L. Skorich, Esq. Upon thorough consideration of the underlying record, the Petition for Appeal, the parties' briefs, and the arguments of counsel, the Court hereby **GRANTS** Petitioner's Petition for Appeal and **REVERSES** the OAH's Final Order.

STANDARD OF REVIEW

The Court reviews the OAH's Final Order pursuant to the West Virginia Administrative Procedures Act, which states as follows:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision, or order are: (1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority or jurisdiction of the agency; (3) Made upon unlawful procedures; (4) Affected by other error of law; (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or (6) Arbitrary

¹ Since January 6, 2020, the Commissioner of the DMV has been Everett J. Frazier.

or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g). Moreover, “[o]n appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented de novo; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.” Syl. Pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 590, 474 S.E.2d 518, 520 (1996).

FINDINGS OF FACT

1. On July 9, 2015, during a heavy rainstorm, Petitioner was involved in a rear end collision in Monongalia County, West Virginia, after allowing the impacted vehicle into the line of traffic ahead of him.

2. The incident occurred in the middle lane while traffic was moving on both sides of the affected vehicles.

3. Detective John Wilhelm, an off-duty member of the Monongalia County Sheriff’s Department, came upon the crash site while traveling north on Stewartstown Road and stopped behind the two motor vehicles involved in the incident.

4. Detective Wilhelm testified that he initially observed Petitioner staggering in the roadway and that Petitioner’s speech was slurred.

5. Detective Wilhelm testified that he was most concerned about leaving the scene because he was not on duty at the time.

6. Shortly thereafter, Trooper C. M. Griffith (“Investigating Officer”) and Senior Trooper S. W. Schlobohm (“Assisting Officer”), both of whom were members of the West Virginia State Police, arrived at the scene of the incident.

7. The Investigating and Assisting Officers testified that, upon initial observation, Petitioner appeared to have difficulty standing, his speech was slurred, his pupils were dilated, and he acted nervous and fidgety.

8. The Assisting Officer testified that Petitioner advised that he had ingested Suboxone the previous evening and that he had also ingested Xanax and Ambien.

9. Petitioner testified that he was prescribed Suboxone in February 2015 and admitted he took the same on the evening of July 8, 2015.

10. Petitioner testified that he did not inform the officers that he ingested Xanax or Ambien the day of the incident.

11. The Investigating Officer testified that, due to extremely heavy rain fall, Petitioner was transported to a nearby bank drive-through for the purpose of administering the standardized field sobriety tests out of the weather.

12. The Assisting Officer administered the field sobriety tests, which included the Horizontal Gaze Nystagmus ("HGN") Test, the Walk-and-Turn Test, and the One Leg Stand Test, while the Investigating Officer observed.

13. The Assisting Officer testified that his attention was potentially divided when administering the field sobriety tests as he was training the Investigating Officer.

14. The Investigating Officer testified that when Petitioner was asked to walk in a straight line to perform the Walk-and-Turn Test, no actual line was drawn or relied upon.

15. The Assisting Officer administered a preliminary breath test, which indicated no evidence of alcohol use by Petitioner.

16. Although Petitioner passed the preliminary breath test, a drug recognition expert was not called to the scene to examine Petitioner.

17. Based upon the officers' observations of Petitioner while completing the field sobriety tests, the Investigating Officer arrested Petitioner and transported him to Ruby Memorial Hospital for a blood test.

18. The Investigating Officer sent the blood specimens to the West Virginia State Police Laboratory which, in turn, sent the specimens to NMS Laboratory, a subcontractor, in Pennsylvania for analysis.

19. The blood analysis conducted by NMS Laboratory tested for various substances, specifically including Xanax and Ambien, as well as amphetamines, barbiturates, cannabinoids, and muscle relaxants—none of which were detected in Petitioner's blood sample. The blood analysis did not test for Suboxone.

20. Following the blood test, Petitioner was transported to the West Virginia State Police detachment in Morgantown for processing and the administration of a designated secondary chemical test of the breath, which indicated that Petitioner had a 0.00% blood alcohol concentration.

21. Petitioner testified that, prior to the incident, and due to recent life events, he had been extremely anxious, had trouble sleeping, and had recently been involved in numerous (non-motor vehicle) incidents.

22. Petitioner testified that, at the time of the incident, he was nervous, fatigued, confused, had acute anxiety, and had difficulty focusing.

23. Petitioner testified that, at the time of the incident, he was not impaired due to drugs.

24. Rodney Richmond testified on behalf of Petitioner. Mr. Richmond has a bachelor's degree and master's degree in pharmacy and serves as a Director of the Center for Drug and Health Information at Harding University in Searcy, Arkansas.

25. Mr. Richmond testified that “there were no positive findings for any of the drugs that were tested.”

26. Mr. Richmond testified that Xanax as a half-life of about 11 hours and that Ambien has a half-life of 2.5 hours.

27. Mr. Richmond testified that Suboxone does not cause nystagmus.

28. On July 21, 2015, the DMV sent Petitioner an Order of Revocation for DUI of controlled substances and/or drugs.

29. On August 10, 2015, Petitioner filed an appeal with the OAH.

30. On December 14, 2017, the OAH conducted an administrative hearing.

31. On September 19, 2019, the OAH entered its Final Order affirming the DMV’s Order of Revocation.

32. On October 21, 2019, Petitioner appealed the OAH’s Final Order to this Court.

DISCUSSION

As grounds for relief, Petitioner sets forth the following assignments of error: (1) the hearing examiner failed to give proper weight to the negative findings of the secondary chemical tests; and (2) the hearing examiner failed to properly credit the testimony of Petitioner’s expert, Rodney G. Richmond.

Secondary Chemical Tests

First, Petitioner argues that his driver’s license was improperly revoked because the negative findings of the secondary chemical tests clearly demonstrate that he was not under the influence of alcohol, controlled substances, and/or drugs during the time of the incident. West Virginia Code § 17C-5-8(b)(1) provides the following: “Evidence that there was, at that time, five hundredths of one percent or less, by weight, of alcohol in his or her blood, is prima facie evidence

that the person was not under the influence of alcohol.” Accordingly, the Legislature offers protection to an individual who may not correctly perform the subjective field sobriety tests by providing a presumption that an individual was not under the influence of alcohol if the secondary chemical test is negative. Although the statute is silent with respect to controlled substances and/or drugs, the Court finds that the same reasoning should apply to situations involving such substances to afford more weight to the results of secondary chemical tests of blood than subjective field sobriety tests.

Here, the secondary chemical test of blood, as well as the secondary chemical test of breath, which were both administered on the day of the incident, failed to detect any alcohol, controlled substances, and/or drugs in Petitioner’s system. The only evidence of drug consumption was Petitioner’s admission that he ingested Suboxone, as prescribed, on the evening of July 8, 2015; however, the State failed to test for Suboxone and Petitioner testified that he does not experience dizziness or fatigue while taking the same.

Additionally, numerous explanations for Petitioner’s performance during the field sobriety tests were presented, including, but not limited to: (1) he was suffering from acute anxiety; (2) he was involved in a traffic incident; (3) traffic was passing him on both sides of the intersection; (4) he was transported to a different location due to heavy rain; (5) at least three officers were involved, one of whom was in training; and (6) there was no baseline to compare his performance.

Despite the foregoing, the hearing examiner relied upon the field sobriety tests as opposed to the secondary chemical test without adequate discussion. While the hearing examiner properly cited West Virginia case law for the proposition that the OAH may revoke an individual’s driver’s license based upon evidence other than a secondary chemical test, none of the cited cases involved

a driver who allegedly failed the field sobriety tests but who also received negative chemical tests for alcohol and drugs.

The secondary chemical tests essentially ruled out alcohol, controlled substances, and/or drugs as a reason for Petitioner's performance during the field sobriety tests. It is not Petitioner's burden to show why he failed certain field sobriety tests. It is the OAH's burden to show that Petitioner was under the influence of alcohol, controlled substances, and/or drugs, and that burden has not been met here.

As such, the Court finds that the hearing examiner improperly weighed the results of the field sobriety tests against the negative findings of the secondary chemical tests as well as the aforesaid explanations for Petitioner's performance during the field sobriety tests.

Expert Testimony

Second, Petitioner argues that his driver's license was improperly revoked because the un rebutted testimony of his expert, Rodney G. Richmond, clearly supports the negative findings of the secondary chemical test. Mr. Richmond testified that the secondary chemical test of blood determined that the substances tested for were either not present in Petitioner's system or the concentration of such substances was undetectable. Although the OAH characterized Mr. Richmond's testimony about half-lives of drugs as "ambiguous," his testimony was thorough, succinct, and merely explained his overall opinion—if the drugs were not detected by the blood analysis, it is unlikely that such substances had any effect on Petitioner. Mr. Richmond also debunked the results of the HGN Test by testifying that Suboxone does not cause nystagmus, which the OAH failed to mention in its Final Order.

As such, the Court finds that the hearing examiner erroneously failed to properly credit the substance of Mr. Richmond's testimony, which supports the negative findings of the secondary chemical test of blood.

CONCLUSIONS OF LAW

Based upon the foregoing, the Court concludes that the OAH clearly erred by failing to give proper weight to the negative findings of the secondary chemical tests and by failing to properly credit the testimony of Petitioner's expert, Rodney G. Richmond.

DECISION

Accordingly, the Court **ADJUDGES** and **ORDERS** as follows:

1. Petitioner's Petition for Appeal is hereby **GRANTED**;
2. The Final Order of the Office of Administrative Hearings entered September 19, 2019, is hereby **REVERSED**; and
3. The Circuit Clerk is directed to strike this matter from the Court's docket and to provide copies of this Order to all counsel of record.

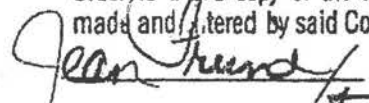
ENTER: 3/1/2022


PHILLIP D. GAUJOT, CHIEF JUDGE

ENTERED: March 1, 2022
DOCKET LINE 39 Jean Friend, Clerk

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State aforesaid do hereby certify that the attached Order, is a true copy of the original Order made and entered by said Court.

 Circuit Clerk

SHORT CASE NAME: Frazier v. Ramadan

CERTIFICATIONS

STATE OF WEST VIRGINIA

I hereby certify that I have performed a review of the case that is reasonable under the circumstances and that the contents of the Notice of Appeal are accurate and complete.

03 / 25 / 2022

Date

Ernest L. Sherich

Counsel of record or unrepresented party

I hereby certify that on or before the date below, copies of this notice of appeal and attachments were served on all parties to the case, and copies were provided to the clerk of the circuit court from which the appeal is taken and to each court reporter from whom a transcript is requested.

03 / 25 / 2022

Date

Ernest L. Sherich

Counsel of record or unrepresented party