

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

James W. Harrison, D.V.M.,	:	
Appellant-Appellant,	:	
v.	:	No. 08AP-848 (C.P.C. No. 08CVF03-4450)
Ohio Veterinary Medical Licensing Board,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on June 16, 2009

Tyack, Blackmore & Liston Co., L.P.A., and Thomas M. Tyack,
for appellant.

Richard A. Cordray, Attorney General, and Barry D. McKew, for
appellee.

APPEAL from the Franklin County Court of Common Pleas.

CONNOR, J.

{¶1} Appellant, James W. Harrison, D.V.M., appeals the August 29, 2008 judgment entry of the Franklin County Court of Common Pleas, which affirmed the March 13, 2008 order of the Ohio Veterinary Medical Licensing Board (the "board")

imposing a fine of \$500 upon appellant. For the reasons that follow, we affirm the decision of the court of common pleas.

{¶2} Appellant is a veterinarian specializing in orthopedic surgery. On July 13, 2004, Patti Smith presented her eight-year-old Briard dog named "Bri" to appellant for treatment of recurrent lameness in the left hind leg. Appellant made the diagnosis of hip dysplasia with degenerative joint disease. On August 5, 2004, appellant performed a total hip replacement surgery. It is undisputed that appellant failed to take postoperative radiographs ("x-rays") on the date of the surgery. Within four days of the surgery, Ms. Smith telephoned appellant and expressed concerns about Bri's condition. On August 10, 2004, appellant conducted a follow-up examination, during which appellant again failed to take x-rays. Appellant conducted additional follow-up examinations on September 3, and October 12, 2004. During these examinations, appellant did take x-rays, which demonstrated that cement from the surgery had leaked into the pelvic area, thereby causing resultant nerve damage. Ms. Smith never again returned to appellant's office. Rather, Ms. Smith filed a complaint against appellant with the board.

{¶3} The board referred the case for an opinion to Dr. Jonathan Dyce, an orthopedic surgery specialist and associate professor at the Ohio State University College of Veterinary Medicine. The board then notified appellant it was considering action against him based upon alleged violations of R.C. 4741.22(A) and former Ohio Adm.Code 4741-1-03(A).

{¶4} Under R.C. 4741.22:

The state veterinary medical licensing board may refuse to issue or renew a license, limited license, registration, or temporary permit to or of any applicant who, and may issue a reprimand to, suspend or revoke the license, limited license,

registration, or the temporary permit of, or impose a civil penalty pursuant to this section upon any person holding a license, limited license, or temporary permit to practice veterinary medicine or any person registered as a registered veterinary technician who:

(A) In the conduct of the person's practice does not conform to the rules of the board or the standards of the profession governing proper, humane, sanitary, and hygienic methods to be used in the care and treatment of animals[.]

Furthermore, under former Ohio Adm.Code 4741-1-03(A):

The board shall, pursuant to section 4741.22 of the revised code and to the extent permitted by law, take action against the license of any veterinarian, for a violation of any of the following regulations:

(A) A departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established.

{¶5} Appellant requested a hearing, which occurred on August 23, 2007 before a hearing examiner. On February 1, 2008, the hearing examiner filed a report and recommendation, which found that appellant violated R.C. 4741.22(A) and former Ohio Adm.Code 4741-1-03(A). As a result, the hearing examiner recommended that appellant's veterinary license be suspended for 30 days. The board unanimously adopted the findings of fact and conclusions of law of the hearing examiner. However, the board modified the recommended sanction and instead imposed a \$500 fine. On March 24, 2008, appellant filed an appeal of the board's decision in the Franklin County Court of Common Pleas.

{¶6} When a common pleas court reviews an order of an administrative agency, it must consider the entire record and determine whether the agency's order is "supported by reliable, probative, and substantial evidence and is in accordance with the law." R.C.

119.12. "Reliable" evidence is evidence that is dependable and may be confidently trusted. *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571. To be reliable, there must be a reasonable probability that the evidence is true. "Probative" evidence is evidence that tends to prove the issue in question. It therefore must be relevant in determining the issue. "Substantial" evidence is evidence with some weight; it must have importance and value. *Id.*

{¶7} However, a common pleas court's review of the administrative record is neither a trial de novo nor an appeal on questions of law only. *Lies v. Ohio Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, citing *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280. Rather, it is a "hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Id.*

{¶8} To conduct its review, a common pleas court must make two separate inquiries. *Bartchy v. State Bd. of Educ.*, 120 Ohio St.3d 205, 213, 2008-Ohio-4826, ¶37, citing R.C. 119.12. The first inquiry is a hybrid factual/legal inquiry, in which the court must give deference to the agency's resolution of evidentiary conflicts. *Bartchy*, citing *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471, 1993-Ohio-182, quoting *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111. Indeed, "an agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Id.* However, "the findings of the agency are by no means conclusive. * * * Where the court, in its appraisal of the

evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court may reverse, vacate, or modify the administrative order.' " *Id.* The second inquiry in the common pleas review requires the court to construe the law on its own. *Bartchy* at ¶38.

{¶9} On August 29, 2008, the trial court issued a judgment affirming the board's order. It is from this judgment that appellant appeals and raises the following assignment of error:

I. THE FINDING OF THE TRIAL COURT AFFIRMING THE DISCIPLINARY ACTION OF THE OHIO VETERINARY MEDICAL LICENSING BOARD IS CONTRARY TO LAW AS THE VETERINARY MEDICAL LICENSING BOARD'S DECISION IS NOT SUPPORTED BY THE QUANTUM OF EVIDENCE AS REQUIRED BY O.R.C. §119.12.

{¶10} On appeal to this court, the standard of review is more limited than that of the trial court. *Harrison v. Ohio Veterinary Med. Licensing Bd.* (Dec. 19, 2000), 10th Dist. No. 00AP-254. The appellate court is in no position to weigh the evidence. *Id.* citing *Columbia Gas Transm. Corp. v. Ohio Dept. of Transp.* (1995), 104 Ohio App.3d 1, 4; see also *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d. 705, 707. Rather, the appellate court is only to determine if the trial court has abused its discretion. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122. An abuse of discretion is not merely an error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. Absent an abuse of discretion on the part of the trial court, an appellate court may not substitute its judgment for that of an administrative agency or a trial court. *Id.* Nonetheless, an appellate court should conduct a plenary review of purely legal questions in an administrative appeal. *Bartchy* at ¶43,

citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343. Accordingly, we must also determine whether the trial court's decision is in accordance with law. *Harrison v. Ohio Veterinary Med. Licensing Bd.*, 10th Dist. No. 08AP-408, 2008-Ohio-6519, ¶7.

{¶11} Appellant presents several arguments as to why the trial court's decision constitutes an abuse of discretion and is not in accordance with law. Generally, appellant's arguments all regard the appropriate standard of care. Appellant argues that the hearing examiner, the board and the trial court all applied a heightened standard of care taught in academia. Additionally, appellant challenges the credentials and qualifications of Dr. Dyce. Further, appellant seemingly suggests that Dr. Dyce did not specifically opine as to the standard of care associated with the Richards II procedure, which was the procedure appellant used on Bri. Appellant's final argument regards the fact that the dog was not injured as a result of appellant's failure to x-ray it immediately after the surgery.

{¶12} Appellant's arguments, however, are all unavailing. First, the trial court correctly held that former Ohio Adm.Code 4741-1-03 authorizes disciplinary action even in the absence of injury to the dog. Next, regarding Dr. Dyce's credentials and qualifications as an expert, appellant failed to raise this argument during the administrative hearing.¹ An appellant's failure to raise an issue during an administrative proceeding constitutes a waiver of the argument upon appeal. *MacConnell v. Ohio Dept. of Commerce*, 10th Dist. No. 04AP-433, 2005-Ohio-1960, ¶21; see also *Wilde v. Ohio*

¹ Appellant objected to Dr. Dyce's testimony on two other grounds. However, neither ground regarded the credentials and qualifications of Dr. Dyce as an expert. Furthermore, although appellant's counsel posed questions to Dr. Dyce regarding his licensure status, appellant never objected to the admissibility of his testimony on that basis.

Veterinary Med. Licensing Bd. (Oct. 1, 1999), 5th Dist. No. 98CA00138, citing *Trademark Homes v. Avon Lake Bd. of Zoning Appeals* (1993), 92 Ohio App.3d 214, 217, citing *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43. In *MacConnell*, this court cited the trial court's finding that an appellant cannot "slumber on his rights at the administrative level and then attempt to raise issues at this level where such issues may have been resolved before the administrative tribunal." *Id.* at ¶22. Therefore, we are unpersuaded by appellant's efforts to undermine Dr. Dyce's expert opinion.

{¶13} As a result, the hearing examiner properly had before him conflicting evidence regarding the standard of care. Specifically, Dr. Dyce opined that postoperative x-rays should be taken immediately after any orthopedic implant surgery and "in these [sorts] of cases." (Tr. 50-52, 84.) As a result, we refuse to accept appellant's argument that Dr. Dyce did not specifically opine as to the standard of care applicable in a Richards II procedure. Furthermore, Dr. Dyce testified that this standard of care is taught by the Ohio State University College of Veterinary Medicine, in addition to being the standard of care recognized by various veterinary groups, including: the AOVEI, the Veterinary Orthopedic Society, the American College of Veterinary Surgeons, and the AO Veterinary Group. (Tr. 51-52, 84.) On the other side, appellant argues that postoperative x-rays should be taken three months after the surgery, and then annually thereafter. In support, appellant cites articles published over 20 years ago.²

{¶14} The hearing examiner weighed the conflicting positions and afforded more weight to Dr. Dyce's testimony, as compared to the antiquated publications in support of appellant's position. He specifically noted "that at least two of these articles * * * are over

² According to the record, the publication date of one of the three articles was unknown.

20 years old." (Feb. 1, 2008 report, at 9, fn. 2.) Accordingly, the hearing examiner found: "the minimal standard of care requires that veterinary surgeons take x-rays immediately following an orthopedic [implant] such as [a total hip replacement] surgery[.]" (Feb. 1, 2008 report, at 11.) Because it is undisputed that appellant failed to take x-rays of Bri on August 5, and August 10, 2004, the hearing examiner held that appellant's conduct fell below the minimum standard of care. This decision was adopted by the board and affirmed by the trial court.

{¶15} Again, as an appellate court, it is not our function to weigh the evidence and substitute our judgment for that of the board and/or the trial court. *Pons*, at 621. Instead, we must defer to the board's resolution of evidentiary conflicts because the fact finder had the opportunity to observe witnesses and make credibility determinations. *Univ. of Cincinnati* at 111. In accordance with this deference, and particularly in light of appellant's limited assignment of error, this court cannot find that the trial court abused its discretion in affirming the board's decision. Indeed, we cannot find that the trial court's decision demonstrates perversity of will, passion, prejudice, partiality, or moral delinquency. *Pons*, at 621. Rather, we find that the trial court's decision was in accordance with law.

{¶16} Accordingly, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and BROWN, JJ., concur.
