

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1098



FELICIANA CONSULTANTS, INC.

VERSUS



**STATE OF LOUISIANA,
DEPARTMENT OF HEALTH & HOSPITALS**

Judgment Rendered: DEC 23 2009

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. 568,014

Honorable Janice Clark, Judge Presiding

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BEFORE: DOWNING, GAIDRY, AND McCLENDON, JJ.

Downing, J. concurs and assigns reasons.

McCLENDON, J.

In this appeal, the State of Louisiana, Department of Health and Hospitals (DHH), appeals the judgment of the district court, reversing DHH's decision to terminate the license of Feliciana Consultants, Inc. (Feliciana) as a Medicaid mental health rehabilitation (MHR) provider. For the reasons that follow, we reverse the judgment of the district court.

FACTUAL AND PROCEDURAL HISTORY

This matter began in April 2007 following a complaint to DHH that Feliciana was not providing psychiatric consultations to its Medicaid recipients. Following some investigation, DHH concluded that Feliciana was in violation of MHR program rules, but allowed Feliciana to submit a plan of correction, which was accepted by DHH on June 27, 2007. In August 2007, the MHR monitoring unit began follow-up compliance monitoring, and deficiencies were still noted. On October 3, 2007, DHH notified Feliciana through an "Education Letter" of its findings and required actions. Feliciana contends that it never received the education letter.¹

Thereafter, on November 16, 2007, DHH advised Feliciana, by a "Notice of Sanction" letter, that it was in violation of two of the MHR program rules, requiring 1) that consumers be offered the option of obtaining the core service of medication management² and 2) that providers have at least five active recipients at the time of any monitoring review, other than the initial application review.³ DHH also advised Feliciana of the imposition of the administrative sanction of termination as an MHR provider effective December 16, 2007, and that Feliciana could reapply for certification as an MHR provider once the program's operational requirements were met. Further, DHH notified Feliciana that it was entitled to an administrative review of DHH's action. Feliciana was

¹ In the education letter, DHH indicated that it was not taking steps at that time to sanction the provider, but noted that if the deficiencies were not corrected, future sanctions were possible.

² See Louisiana Register, Vol. 31, No. 05, May 20, 2005 Chapter 3, Subchapter A, Sections 301 and 315 and MHR Provider Manual, Section 31.2, page 22.

³ See Louisiana Register, Vol. 32, No. 11, November 20, 2006 Chapter 7, § 731 H.3.b.

also advised that after an "Informal Review" and "Notice of the Results," it was entitled to seek an appeal before the DHH's Bureau of Appeals.

Feliciana timely requested an informal review, which was held on December 19, 2007. DHH upheld its decision to terminate the license of Feliciana on January 25, 2008, based on the failure of Feliciana to supply requested documentation. On February 22, 2008, Feliciana requested an administrative appeal.⁴ The appeal hearing was held on May 8, 2008, before an administrative law judge (ALJ). On May 19, 2008, DHH adopted the findings of the ALJ, who concluded that, on the date of the sanction letter, Feliciana did not offer the option of obtaining the core service of medication management and did not have at least five active recipients.

On June 18, 2008, Feliciana filed a petition for judicial review, asserting that the decision of DHH to terminate its license was arbitrary, capricious, and an abuse of discretion. Following a hearing on August 12, 2008, the district court rendered its decision, reversing the decision of DHH. A judgment was signed on January 26, 2009, and DHH filed a motion and order for a suspensive appeal. The district court denied the motion on the basis that the judgment was not a final judgment. After DHH applied for supervisory writs, we issued a published per curiam decision granting DHH's application for supervisory writs and remanding the matter to the district court to grant DHH a devolutive appeal. See Feliciana Consultants, Inc. v. State, Dept. of Health and Hospitals, 09-0379 (La.App. 1 Cir. 5/20/09), 16 So.3d 379.

SPECIFICATIONS OF ERROR

In this appeal, DHH assigns the following as error:

- 1) The district court erred in reversing the administrative law judge's ruling, by finding that there were multiple active recipients at the time Feliciana's MHR provider license was terminated.

⁴ Prior to the hearing, DHH notified the parties that the hearing would be limited to two issues: 1) whether Feliciana, on the date of the sanction letter, complied with MHR rules at sections 301 and 315 regarding medication management, and 2) whether Feliciana, on the date of the sanction letter, complied with MHR rules at section 731 H.3.b requiring that a provider have at least five active recipients.

- 2) The district court erred by reversing the administrative law judge on the basis of the district court's above stated factual finding that is completely unsubstantiated by the administrative record.
- 3) The district court erred by only considering one of the grounds for termination – the failure to have at least five active recipients – as the basis of its reversal and failing to address the other ground of termination – the failure to offer the core service of medication management.

STANDARD OF REVIEW

Louisiana's Administrative Procedure Act (LAPA) is set forth in LSA-R.S. 49:950, *et seq.* The LAPA was enacted to establish certain procedures for state agencies for adoption of rules, adjudication of matters, and judicial review of administrative rulings. **Women's and Children's Hosp. v. State, Dept. of Health and Hospitals**, 08-946, pp. 5-6 (La. 1/21/09), 2 So.3d 397, 401.

The LAPA provides for judicial review of administrative adjudications. In pertinent part, LSA-R.S. 49:964A states, "a person who is aggrieved by a final decision or order in an adjudication proceeding is entitled to judicial review." The LAPA specifies that judicial review shall be confined to the record, as developed in the administrative proceedings. LSA-R.S. 49:964F. Further, the extent of the review by the district court is governed by LSA-R.S. 49:964G, which provides:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of

demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

The general principle governing judicial review is that, where some evidence as reasonably interpreted supports the regulatory body's determination, the orders of the regulatory bodies exercising discretionary authority are accorded great weight and should not be overturned by the courts in the absence of a clear showing that the administrative action is arbitrary and capricious. **Women's and Children's Hosp.**, 08-946 at p. 8, 2 So.3d at 403; **Baton Rouge Water Works Company v. Louisiana Public Service Commission**, 342 So.2d 609, 612 (La.1977). The test for determining whether the action is arbitrary and capricious is whether the action taken is reasonable under the circumstances. Stated differently, the question is whether the action taken was without reason. **Matter of Recovery I, Inc.**, 93-0441, pp. 17-18 (La.App. 1 Cir. 4/8/94), 635 So.2d 690, 699-700, writ denied, 94-1232 (La. 7/1/94), 639 So.2d 1169.

Once a final judgment is rendered by the district court, an aggrieved party may seek review by appeal to the appropriate appellate court. LSA-R.S. 49:965. On review of the district court's judgment, no deference is owed by the court of appeal to the factual findings or legal conclusions of the district court, just as no deference is owed by the Louisiana Supreme Court to factual findings or legal conclusions of the court of appeal. **Wild v. State, Dept. of Health and Hospitals**, 08-1056, p. 6 (La.App. 1 Cir. 12/23/08), 7 So.3d 1, 4-5. Consequently, we will conduct our own independent review of the record in accordance with the standards provided in LSA-R.S. 49:964G.

DISCUSSION

Established in 1965, the Medicaid program is designed to provide medical benefits to certain groups of low-income people. **Women's and Children's Hosp.**, 08-946 at p. 1, 2 So.3d at 398-99. The Medicaid program is jointly administered by the federal and state governments pursuant to the Medicaid Act (Act), 42 U.S.C. § 1396, *et seq.* Although the federal government establishes

general guidelines for the program, the Medicaid program requirements are established by each state. The Medicaid program is a voluntary program in which each state may choose to participate. At the federal level, the Department of Health and Human Services (DHHS) is responsible for administering the Medicaid program. **Women's and Children's Hosp.**, 08-946 at pp. 1-2, 2 So.3d at 399.

In order to receive federal Medicaid funding, states must have in effect a written state plan that has been submitted to and approved by DHHS. The plan is essentially the state's agreement that it will conform to the requirements of the Act and the official issuances of DHHS. Louisiana is a participant in the Medicaid program and administers its program via a state plan and amendments. DHH is the state agency that administers the Louisiana State Medicaid Program. **Id.** An individual is entitled to Medicaid assistance if the criteria established by the state where the individual resides are fulfilled. **Wild**, 08-1056 at p. 8, 7 So.3d at 6.

In this matter, Pamela Brown, program manager for Medicaid program operations, was the first to testify for DHH at the administrative appeal hearing. She stated that no medication management was billed by Feliciana between October 1, 2006 and December 31, 2007. She stated that medication management is normally provided by physicians on staff for any recipients who require medication. Not all recipients need medication; however, over a period of time, it is reasonable to believe that each MHR provider would have billed for medication management for some recipients. Feliciana came to her attention because of complaints that it had a psychiatrist on staff who did not do consultations with recipients.

Keith Durham, mental health special services director for the MHR program, also testified. He stated that an initial complaint was referred to his department regarding medication management. Consumer interviews were conducted, and it was confirmed that medication management was not being provided by Feliciana. Thereafter, a notice of deficiency was issued to Feliciana

on May 10, 2007. On May 23, 2007, Feliciano submitted a plan of correction, which was denied. On June 27, 2007, a revised plan of correction was submitted by Feliciano and was approved. On August 30, 2007, the monitoring unit began a 60-day follow-up to determine if the plan of correction was being implemented. At that time, Feliciano was informed that the plan of correction was accepted. The follow-up showed that deficiencies still existed, so an education letter was sent to Feliciano on October 3, 2007. Mr. Durham stated that this was the letter that Feliciano contends it did not receive. He explained that DHH could have sanctioned Feliciano at that time, but sent the letter as a courtesy to educate the provider.

Besides the medication management issue, Mr. Durham stated that Feliciano was also not providing services to five active recipients as required by the MHR rules. Mr. Durham explained that when a provider wants to place a client in the MHR program, the provider requests authorization from the prior authorization (PA) unit to have the client entered into the computer system. If the client is eligible for the MHR program, services are authorized. Mr. Durham stated that in order to be reimbursed by Medicaid, recipients have to have prior authorization by DHH. Therefore, once imputed into the database, a systems report can be run to determine how many active PA numbers a provider has at any one time. Mr. Durham stated that on November 16, 2007, he ran a PA numbers report. On that date, Feliciano had only one active recipient. Mr. Durham also submitted a report showing that the active PA numbers from November 1, 2007 to January 29, 2008, totaled one active authorization during that time period.

Mr. Durham further testified that because of these rule violations, a notice of sanction was issued, and an informal review hearing was held on December 19, 2008. Mr. Durham stated that no new information was presented at the informal review hearing to establish compliance, but Feliciano was given another opportunity and another ten days to show compliance. On December 29, 2007, Mr. Durham ran another report for active PAs. There was still only one active

PA. He stated that telephone calls were exchanged, another week was given to Feliciana to provide the necessary information; however, no compliance was established. Therefore, on January 25, 2008, DHH made the decision to impose the sanction of termination.

Darrell Montgomery, the program manager for the day-to-day operations of the MHR program, testified on behalf of Feliciana. Feliciana asserted that its reports entitled "Active Client List" and "Services without a PA" established that it had more than five active clients on the date in question. Referring to the documents, Mr. Montgomery stated that a client of the MHR program is not considered an active client if he or she is not authorized after review by the PA department to determine if a client meets the medically necessary criteria for services. He further testified that providers are allowed to enter clients into the system before they are authorized. Accreditation standards require that anyone who goes to an MHR provider has to be accounted for and transferred to other services if found to be ineligible.

Mr. Montgomery testified that the decision to impose sanctions because Feliciana was not offering medication management services was based not only on the lack of billing, but also based on interviews with clients showing that recipients were not given a choice to see a psychiatrist at Feliciana. Mr. Durham also stated at this point in the proceedings that there was no evidence that consultations were being performed by the recipients' primary care physicians.⁵

In its appeal decision, the ALJ found that the preponderance of the evidence established that Feliciana was not in compliance with the cited rules. The ALJ concluded that the evidence and testimony showed that on the date of the sanction letter, Feliciana did not offer the option of obtaining the core service of medication management and did not have at least five active recipients.

We have carefully reviewed the record, and we find that there is sufficient evidence to support the ALJ's findings. We also conclude that DHH's decision to

⁵ Feliciana also submitted a document showing that on October 11, 2007, it was recertified by the Office of Mental Health based on documents submitted for review.

terminate the license of Feliciano was not arbitrary or capricious. The evidence, as reasonably interpreted, supports the determination of the administrative agency, and the action taken was reasonable under the circumstances. Therefore, we find no grounds upon which the district court could have reversed DHH's decision to terminate Feliciano's license. The district court clearly erred in finding that Feliciano had more than five active recipients. Also, the evidence demonstrated that the core service of medication management was not being offered by Feliciano, and the district court failed to address this MHR rule violation.

Accordingly, we reverse the judgment of the district court reversing the decision of DHH to terminate the license of Feliciano as a mental health rehabilitation provider.

CONCLUSION

For the above and foregoing reasons, we reverse the January 26, 2009 judgment of the district court. Costs of this appeal are assessed to Feliciano Consultants, Inc.

REVERSED.

STATE OF LOUISIANA
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FELICIANA CONSULTANTS, INC.

VERSUS

STATE OF LOUISIANA,
DEPARTMENT OF HEALTH & HOSPITALS

 **DOWNING, J., concurs and assigns reasons**

While the majority reaches the correct result, it applies an incorrect standard of review to this matter. In **St. Martinville, L.L.C. v. Louisiana Tax Com'n**, 05-0457, p. 4 (La.App. 1 Cir. 6/10/05), 917 So.2d 38, 41-42, and its predecessors, this court explained why an appellate court must give deference to a trial court's factual findings in an administrative review pursuant to the Louisiana Administrative Procedure Act, La. R.S. 49:964G(6). This subparagraph provides as follows:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. **In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review.** In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues. (Emphasis added.)

This language, enacted by the Louisiana legislature in Acts 1997, No. 128, § 1, effective June 12, 1997, to amend paragraph G(6), clearly makes

the trial court a fact finder who weighs the evidence and makes its own conclusions of fact by preponderance of the evidence. Accordingly, we give deference to the trial court's factual determinations and use a manifest error standard of review where the legislature has empowered it with the function of fact finding, while giving due deference to the agency's credibility determinations. **St. Martinville, L.L.C.**, 05-0457, p. 4 (La.App. 1 Cir. 6/10/05), 917 So.2d at 41-42.

In **Virgil v. American Guarantee and Liability Insurance Company**, 507 So.2d 825, 826 (La.1987), the Louisiana Supreme Court observed that the manifest error standard of review applies to the trial court's factual findings even when the evidence before it consists solely of written reports, records and depositions. The supreme court explained that deference is due to the trial court's fact finding function under Louisiana's three-tiered court system, as follows:

Louisiana's three-tiered court system allocates the fact finding function to the trial courts. Because of that allocation of function (as well as the trial court's normal procedure of evaluating live witnesses), great deference is accorded to the trial court's factual findings, both express and implicit, and reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on appellate review of the trial court's judgment. **Id.**

While the majority claims not to defer to the trial court's factual determinations, it specifically finds no grounds on which the district court could have reversed DHH's decision and concludes that the district court "clearly erred in finding that Feliciana had more than five active recipients." The majority also concluded that the district court failed to address an MHR rule violation.

Essentially, the majority concluded that the trial court was both manifestly and legally erroneous in its findings. On this basis, I agree with the result reached by the majority.