Circuit Court for Washington County
Case No. 21C16057250

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0086

September Term, 2017

TIMBERLIE ADAMS

v.

MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Meredith,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: September 28, 2018

On December 15, 2015, the Maryland State Department of Health and Mental Hygiene (hereinafter "the Department"), issued a Notice of Termination to Timberlie Adams, R.N. (hereinafter "Appellant") who was employed at Western Maryland Hospital Center (hereinafter "WMHC"). A hearing was held on May 11, 2016, before an Administrative Law Judge (hereinafter "ALJ"), at the Office of Administrative Hearings, who issued a final decision concluding that the Department lawfully terminated Appellant's employment.

On June 6, 2016, Appellant petitioned for judicial review of the ALJ's final decision in the Circuit Court for Washington County. After holding a hearing on February 15, 2017, the circuit court affirmed the ALJ's final decision.

Appellant timely filed this appeal and presents the following question for our review, which we rephrased:[1]

I. Did the ALJ lack substantial evidence in affirming Appellant's termination?

For the following reasons, we answer in the negative and affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On November 17, 2015, Appellant was assigned to the 7:00 p.m. to 7:00 a.m. shift at WMHC's Unit 2E, a unit that houses ventilator patients. One of Appellant's patients, S.W., was on a ventilator. S.W. had diabetes mellitus and hyperglycemia. Insulin is

[1] Appellant presents the following question:

1. Whether the decision of the ALJ is unsupported by substantial, credible evidence in light of the record as a whole, and is otherwise effected by error of law such as to require reversal?

required to treat and diminish high blood glucose levels associated with hyperglycemia. If hyperglycemia is left untreated, hyperglycemia can cause serious life-threatening complications. S.W.'s physician, Dr. Rhonda Sipes, issued a written order instructing that S.W.'s blood glucose levels be tested daily at 5:30 a.m., 11:30 a.m., 5:30 p.m., and 11:30 p.m., and that if S.W's blood glucose level reading ever exceeded 400 mg/dl to administer 16 units of insulin and notify the physician.[2] WMHC's general medication policy permits nurses to administer medication within a two-hour "window" of a scheduled dose.[3]

On the evening of November 17, 2015, at 11:19 p.m., Appellant tested S.W.'s blood glucose level and obtained a reading of 420 mg/dl. At 11:21 p.m., Appellant retested S.W., but the meter recorded a "Flow Error." At 11:22 p.m., Appellant again tested S.W. and obtained a reading of 387 mg/dl. Appellant then administered 14 units of insulin to S.W. and monitored S.W. throughout the night.[4] At no time did Appellant notify a physician.

On the morning of November 18, 2015, at 5:02 a.m., Appellant pricked S.W.'s finger and obtained a reading of 408 mg/dl. At 5:03 a.m., Appellant retested S.W. and

[2] Dr. Sipes' order stated that units of insulin must be administered according to the following sliding scale: "0-150[mg/dl]: No insulin; 151-200[mg/dl]: 4 units; 201-250[mg/dl]: 8 units; 251-300[mg/dl]: 10 units; 301-350[mg/dl]: 12 units; 351-400[mg/dl]: 14 units; greater than 400[mg/dl]: 16 units and notify M.D."

[3] For instance, for S.W.'s insulin dose scheduled for 5:30 a.m., a nurse could test S.W. and then follow the physician's order for insulin administration as early as 4:30 a.m. or as late as 6:30 a.m.

[4] The statement of facts from the ALJ's decision omits that Appellant administered 14 units of insulin. However, Appellant and Appellee both concede that Appellant administered 14 units of insulin to S.W. Appellant states in her brief that the 14 units of insulin was appropriate according to Peggy Beltran, R.N. Director of Nursing.

obtained a confirmed reading of 412 mg/dl. Nearly 45 minutes after the 5:03 a.m. test result, Appellant performed another blood glucose level test and obtained a reading of 441 mg/dl. At 5:47 a.m., Appellant tested S.W. for the fourth time and obtained a reading of 404 mg/dl. Although all four readings were greater than 400 mg/dl, Appellant did not administer 16 units of insulin nor did she notify the physician. At 5:48 a.m., Appellant tested S.W. for the fifth time and obtained a reading of exactly 400 mg/dl. Appellant then administered 14 units of insulin to S.W.[5] Appellant documented the 400 mg/dl blood glucose level reading and her administration of 14 units of insulin in S.W.'s medical record. However, Appellant did not document any of the four prior blood glucose level readings in S.W.'s medical record.

On the morning of November 18, 2015, at approximately 5:30 a.m., Appellant spoke to her supervisor, Linda Zittle, R.N., who also had access to S.W.'s medical records. Appellant informed Zittle that S.W. had two blood glucose level readings over 400 mg/dl. Appellant also informed Zittle that she would test S.W. again later. Zittle requested Appellant inform her of the physician's instructions since S.W.'s blood glucose level was over 400 mg/dl. At around 7:00 a.m., Appellant told Alemtsehay Bogale, a licensed practical nurse for the next shift, that S.W. had a blood glucose level of 408 mg/dl and that when she rechecked it, it was 400 mg/dl. Bogale then informed Gay Upperman, a unit clerk, that Appellant "reported to her that [Appellant] continued to take finger sticks on

[5] The statement of facts from the ALJ's decision states that Appellant administered 12 units of insulin. However, Appellant and Appellee both concede that Appellant administered 14 units of insulin to S.W.

S.W. until [Appellant] got a reading [of] 400 or below so that she would not have to call the doctor."[6] Bogale suggested Upperman report this information to management. After receiving the report, Peggy Beltran, the Director of Nursing at WMHC, conducted an investigation.

In her investigation, Beltran concluded that between 5:02 a.m. and 5:48 a.m. on November 18, 2015, Appellant conducted five blood glucose level tests on S.W., subjecting S.W. to one or more unnecessary finger sticks. Each test yielded a reading of 400 mg/dl or above; however, Appellant only recorded one of those five readings. Beltran; David Davis, the Chief Operating Officer for WMHC; and Dr. Laura Mercer, the Chief Nursing Officer for WHMC, held a mitigating conference with Appellant. At the conference, Appellant provided no mitigating circumstances nor any other reason that prevented her from notifying the physician and administering the medication as ordered. Upon reviewing the results of the investigation, the Department terminated Appellant's employment on December 15, 2015. The Department cited in its Notice of Termination 17 different policy, regulatory and statutory violations that Appellant violated. On December 16, 2015, Appellant brought this action to the Secretary of the Department of Budget and Management who then forwarded the case to the Office of Administrative Hearings for a hearing.

[6] Appellant testified that she left a note for the physician, Dr. Sipes, but did not otherwise notify the physician promptly that S.W.'s blood sugar levels exceeded 400 mg/dl. This note was not offered in evidence, and its contents were not described at the hearing. Dr. Sipes did not testify. The record also does not establish if or when Dr. Sipes received this note.

On May 11, 2016, the ALJ issued a decision concluding that the Department lawfully terminated Appellant's employment. The ALJ dismissed 12 out of the 17 violations charged against Appellant. Specifically, the ALJ found that by neither administering insulin nor calling the physician after obtaining a blood glucose level reading of over 400 mg/dl on November 18, 2015, Appellant violated: (1) COMAR[7] 10.27.09.02E(1) because Appellant failed to implement the plan of care established by the physician's order; (2) COMAR 10.27.09.03B(2)(b)(iii) because Appellant failed to comply with WMHC's policy and procedure; (3) Md. Code. Ann., Health Occupations, § 8-316(a)(8) because Appellant acted inconsistently with generally accepted professional standards in nursing; (4) COMAR 10.27.09.02E(2)(a)(vi) because Appellant did not record four of the five blood glucose level readings above 400 mg/dl obtained on November 18, 2015; and (5) COMAR 17.04.05.04.B(1) because Appellant was negligent in the performance of her duties as a State employee. On June 6, 2016, Appellant filed a petition for judicial review in the Circuit Court for Washington County. The circuit court held a hearing, and on February 15, 2017, affirmed the ALJ's decision.

DISCUSSION

A. Parties' Contentions

Appellant argues that the decision of the ALJ was not supported by substantial evidence in the record. Appellant contends that the ALJ's decision to sustain 5 of the 17 violations was inconsistent with the alleged violations the ALJ dismissed. Specifically,

[7] Code of Maryland Regulations ("COMAR").

Appellant asserts that the ALJ's decision does not define what constitutes an "intervention" under COMAR 10.27.09.02E(1) and ignores the evidence and testimony that the administration of insulin to S.W. was timely because it was administered within the two-hour window despite the physician's order. Appellant argues that she did not violate the WMHC Glucose Meter Testing Policy because Appellant had problems accessing the computer system and management was aware of this issue.[8] Appellant asserts there was no policy that stating nurses were required to document a patient's blood glucose level reading in their medical file. Moreover, Appellant contends the ALJ erroneously concluded that Appellant breached the applicable standard of care absent expert witness testimony. Lastly, Appellant argues that the ALJ lacked substantial evidence to conclude that Appellant was negligent in performing her duties and did not consider mitigating circumstances in affirming her termination as required by COMAR 17.0405.02.

The Department responds that there is "[s]ubstantial evidence in the record [that] supports the ALJ's conclusion that the Department lawfully terminated [Appellant's] employment at WMHC, and there was [sic] no errors of law." In support of this argument, the Department points specifically to the events that occurred on November 18, 2015. The Department argues that Appellant's "admissions to these significant facts, along with other evidence and testimony in the record, constitutes uncontested substantial evidence for the

[8] WMHC Glucose Meter Testing Policy provides that a blood glucose level greater than 400 mg/dl is considered a "Critical Lab Value." The policy states that when a Critical Lab Value is obtained, the registered nurse is to repeat the test, notify the physician, and check the patient's medical record for standing orders. The policy was made available to all nurses on WMHC's computer system's "W drive," and a hard copy was also available for review.

ALJ's conclusion that [Appellant] violated five of the Department's grounds for terminating [Appellant's] employment." The Department concedes that Appellant "was not aware of the Nova StatStrip Glucose Meter policy or the Critical Labs Value Policy. However, the ALJ found that the policies and procedures of WMHC require nurses to strictly comply with a physician's written orders and Appellant failed to do so."

Finally, the Department contends that the ALJ's conclusion was not arbitrary and capricious. Specifically, the Department points to the ALJ's finding that "the Department documented that [Appellant] failed to provide any mitigating circumstances or reasons for why she could not have at least contacted the physician, and consulted with Zittle in real time, or administered the insulin as ordered by the physician." We agree.

B. Standard of Review

Appellant asks this Court to review the ALJ's decision because she believes that the ALJ lacked substantial evidence in affirming her termination. "'On appellate review of the decision of an administrative agency, this Court reviews the agency's decision, not the circuit court's decision.'… 'Our primary goal is to determine whether the agency's decision is in accordance with the law or whether it is arbitrary, illegal and capricious.' In other words, [w]e apply a limited standard of review and will not disturb an administrative decision on appeal if substantial evidence supports factual findings and no error of law exists.'" *Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 273-74 (2012) (citing *Halici v, City of Gaithersburg*, 180 Md. App. 238, 248 (2008)).

In general, "[a] court's role is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine

if the administrative decision is premised upon an erroneous conclusion of law." *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 568 (1998).

C. Analysis

1. Code of Maryland Regulations Title 10

i. COMAR 10.27.09.02E(1)

COMAR 10.27.09.02E(1), which lays out the standards of practice for registered nurses, requires registered nurses to "implement the interventions identified in the plan of care." Appellant is correct that the ALJ's decision does not define the term "intervention." However, the regulation states the following:

> (b) Interventions may include, but are not limited to:
> (i) Patient teaching;
> (ii) Counseling;
> (iii) Implementing clinical practice guidelines, protocols, and pathways; and
> (iv) Independent nursing functions

Accordingly, an intervention under the regulation requires a registered nurse to implement "clinical practice guidelines, *protocols*, and pathways." (Emphasis added). Here, Appellant was required to implement the plan of care set forth by Dr. Sipes' order, which required Appellant to administer 16 units of insulin if S.W.'s blood glucose level reading was over 400 mg/dl and to notify the physician. The record shows that on November 18, 2015, while Appellant obtained four blood glucose level readings that were over 400 mg/dl, Appellant did not administer 16 units of insulin, nor did she notify the physician.

Appellant asserts that Zittle and Dr. Mercer both testified that WHMC's two-hour window policy overrides a physician's order and that no witness testified that

administrating insulin must be given at a specific time. However, Appellant's argument holds no merit. Specifically, Zittle testified that nurses are required to follow a physician's order and are not permitted to use their own judgment when treating a patient. Moreover, Dr. Mercer testified that Appellant did not administer the required 16 units of insulin when S.W.'s blood glucose level reading was over 400 mg/dl.

Appellant also argues that there was no evidence for the ALJ to conclude that Appellant did not inform Zittle that she obtained four readings that were over 400 mg/dl and that Zittle instructed Appellant not to notify the physician. However, the record shows that Zittle provided a written statement to Beltran, the Director of Nursing, in connection with her investigation. At no time during her testimony, nor in her written statement, did Zittle state that Appellant notified her that Appellant had taken four blood glucose level readings above 400 mg/dl. Zittle denied Appellant's contention that Zittle instructed her not to notify the physician.

Lastly, Appellant argues that while she conducted the same actions on November 17, 2015, and November 18, 2015, she was only sanctioned for her actions on November 18th. The Department contends that the facts on November 17, 2015, were different from November 18, 2015. Specifically, the Department argues "[Appellant] obtained one blood glucose reading over 400 mg/dl and then, upon the re-test, the glucometer registered a flow error. A third test yielded a reading under 400 mg/dl. There is no evidence that [Appellant] chose not to follow [the] physician's order on November 17th."

The WMHC Glucose Meter Testing Policy provides that a blood glucose level greater than 400 mg/dl requires a nurse to repeat the test, notify the physician, and check

the patient's medical record for standing orders. On November 17, 2015, Appellant obtained a blood glucose level reading that was greater than 400 mg/dl but did not notify the physician or administer the required insulin. However, WMHC is granted some discretion in handling certain violations committed by its staff. Like the discretion given to a police officer in determining whether to pull over a driver who is speeding, WMHC has discretion in determining when and how to punish a registered nurse who fails to adhere to certain guidelines. In this case, WMHC's power to terminate Appellant for her actions on November 18, 2015, is not limited by WMHC's failure to fire Appellant for her actions on November 17th. Although, the Department did not discipline Appellant for her actions on November 17th, the record shows that Appellant did not follow Dr. Sipes' order and as noted above, nurses at WMHC are required to follow a physician's order.

Accordingly, the ALJ had sufficient facts and evidence to conclude that Appellant's actions violated COMAR 10.27.09.02E(1). Based on the evidence relied on by the ALJ, the ALJ made sufficient findings of fact and did not err when it found that Appellant failed to implement the interventions identified in Dr. Sipes' order.

ii. COMAR 10.27.09.02E(2)(a)(iv)

COMAR 10.27.09.02E(2)(a)(iv) requires interventions to be "documented" by a registered nurse. Appellant argues that WMHC has no policy that requires nurses to document an intervention. Appellant contends that the Department did not discipline her for failing to document S.W.'s blood glucose level readings on November 17th but disciplined her for failing to document S.W.'s readings on November 18th. Lastly, Appellant argues that there was no need for Appellant to document S.W.'s blood glucose

level readings because the glucose meter generates a blood glucose level reading within seconds and automatically transmits all readings to WMHC's laboratory computer system.

As noted above, WMHC policy provides that a blood glucose level reading greater than 400 mg/dl requires a nurse to repeat the test, notify the physician, and check the patient's medical record for standing orders. The policy does not require the nurse to document the patient's blood glucose level reading in the patient's medical record. However, COMAR Title 10 applies to registered nurses that are employed by the state. Here, Appellant was employed by WMHC, a state-run facility, and Appellant was a registered nurse. As such, COMAR Title 10 applies to Appellant's conduct on November 17, 2015, and on November 18, 2015. The record shows that on November 17, 2015, Appellant failed to document two of the three blood glucose level readings and on November 18, 2015, Appellant failed to document four of the five blood glucose level readings performed on S.W.

Accordingly, the ALJ had sufficient facts and evidence to conclude that Appellant's actions violated COMAR 10.27.09.02E(2)(a)(iv). Based on the evidence relied on by the ALJ, the ALJ made sufficient findings of fact and did not err when it found that Appellant failed to document interventions.

iii. COMAR 10.27.09.03B(2)(b)(iii)

COMAR 10.27.09.03B(2)(b)(iii) requires a registered nurse to "demonstrate knowledge of and shall comply with: … [t]he policies and procedures of the practice setting." Appellant argues that she had problems accessing the hospital's computer system and as a result, could not obtain the WMHC Glucose Meter Testing Policy. Moreover,

Appellant contends that the ALJ could not find by a preponderance of evidence that Appellant was aware of the policy. Lastly, Appellant contends that she could not comply with the policies and procedures because Appellant did not have access to the hospital's computer system.

The record shows that on November 9, 2015, Appellant emailed Dr. Mercer stating that she had problems accessing the WMHC Glucose Meter Testing Policy on the hospital's computer system and that she had "found a copy of [the policy]" but could not verify if the copy was the most recent version of the policy. The ALJ found that the Department could not establish by a preponderance of evidence that Appellant was aware of the policy, stating that the policy may "have been unavailable to [Appellant] because of her difficulty in accessing the W drive." This Court concedes that the policy may have been unavailable to Appellant. However, Appellant was given physician's instructions and failed to comply with such instructions. As noted above, nurses at WMHC are required to comply with a physician's order.

Accordingly, the ALJ had sufficient facts and evidence to conclude that Appellant's actions violated COMAR 10.27.09.03B(2)(b)(iii). Based on the evidence relied on by the ALJ, the ALJ made sufficient findings of fact and did not err when it found that Appellant failed to comply with "the policies and procedures of the practice setting."

iv. COMAR 17.04.05.04B(1)

COMAR 17.04.05.04B(1) provides that "[a]n employee may be disciplined for… (1)[b]eing negligent in the performance of duties." Appellant argues that the ALJ had insufficient facts to uphold the violations found under COMAR Title 10. Therefore,

Appellant contends that the ALJ could not find that she was negligent in performing her duties. As noted above, based on the evidence relied on by the ALJ, the ALJ made sufficient findings of fact to find that Appellant committed numerous violations under COMAR Title 10 and as such, was negligent in the performance of her duties.

v. COMAR 17.04.05.02

COMAR 17.04.05.02 provides that "the Office of Administrative Hearings shall consider mitigating circumstances when determining the appropriate discipline… [T]he Office of Administrative Hearings may not change the discipline imposed by the appointing authority… unless the discipline imposed was clearly an abuse of discretion and clearly unreasonable under the circumstances." Appellant argues that the ALJ did not consider mitigating circumstances and that the ALJ should have found that Appellant's termination was "the most severe disciplinary action."

In this case, the ALJ considered the evidence adduced at the hearing and determined that it supported a finding that Appellant did not comply with the physician's order and that the Department did not abuse its discretion when the Department terminated Appellant's employment. The ALJ also found that the Department "'consider[ed] mitigating circumstances' as required by COMAR 17.04.05.02B." Specifically, the Department held a mitigating conference with Appellant and at the conference Appellant provided no mitigating circumstances or reasons that prevented her from notifying the physician or administrating the medication as ordered. Accordingly, the ALJ had sufficient facts and evidence to conclude that the Department did not abuse its discretion when it terminated Appellant's employment after considering mitigating circumstances.

a. Standard of Care

Maryland Code Ann., Health Occupations, § 8-316(a)(8) provides that a nurse's license may be suspended or revoked if the nurse's actions are "inconsistent with generally accepted professional standards in the practice of registered nursing or licensed practical nursing." Appellant argues that the ALJ erroneously found that Appellant breached the applicable standard of care absent any expert testimony. Appellant contends that the ALJ improperly relied on Dr. Mercer's testimony "to establish that [Appellant] improperly delayed treatment and disregarded a doctor's order." To support her argument, Appellant cites to *Schultz v. Bank of Am., N.A.*, 413 Md. 15, 28-29 (2010), stating the court found that when the applicable standard of care is not obvious expert testimony is required.

The testimony of an expert is "generally necessary to establish the requisite standard of care owed by [a] professional." *Rodriguez v. Clarke*, 400 Md. 39, 71 (2007). Specifically, expert *medical* testimony is required "when the subject of the inference '[presented to the jury]' is so particularly related to some science or profession that it is beyond the ken of the average layman 'and is not required' on matters of which jurors would be aware by virtue of common knowledge." *Bean v. Dept. of Health*, 406 Md. 419, 432 (2008) (citing *CIGNA Prop. & Cas. Cos. v. Zeitler*, 126 Md. App. 444, 463 (1999) (emphasis added).

There is, however, an exception to this general rule. The Court of Appeals held that expert testimony is unnecessary to establish the applicable standard of care in every case involving alleged negligence by a professional. For instance, expert testimony is not required if "the alleged negligence, if proven would be so obviously shown that the trier of

fact could recognize it without expert testimony." *Schultz*, at 29 (2010) (citing *Crockett v. Crothers*, 264 Md. 222, 285 (1972)). The Court of Appeals has also described instances involving professional negligence that do not require expert testimony. For example, in *Bean v. Dept. of Health*, the Court of Appeals held that a defendant who is committed to a mental institution is not required to present expert testimony because "[the] case did not present a complex medical issue, but rather depended on resolving a factual dispute". *Bean*, at 433.

The ALJ correctly concluded that "expert testimony is not necessary to conclude that [Appellant's] disregard of the physician's order was 'an act that is inconsistent with generally accepted professional standards in the practice of registered nursing.'" Here, the ALJ found that Appellant failed to follow a written physician's order. Moreover, Dr. Mercer and Zittle testified that the WMHC policy requires nurses to follow physicians' orders and no nurse has authority to disregard such orders. The ALJ did not need expert testimony to determine that Appellant disregarded a physician's order, potentially exposing a hyperglycemia patient to serious life-threatening complications. In doing so, Appellant's disregard was "inconsistent with generally accepted professional standards in the practice of registered nursing."

Accordingly, the ALJ had sufficient facts and evidence to conclude that Appellant's actions violated Maryland Code Ann., Health Occupations, § 8-316(a)(8). Based on the evidence relied on by the ALJ, the ALJ made sufficient findings of fact and did not err when it found that Appellant breached the applicable standard of care.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.