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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JAMES R. MUSSER,

Plaintiff and Appellant,

v.

DEPARTMENT OF HEALTH CARE
SERVICES et al.,

Respondent.

B281300

(Los Angeles County
Super. Ct. No. BS159409)

APPEAL from a judgment of the Superior Court of Los Angeles County. Amy D. Hogue, Judge. Affirmed.

Law Offices of Norman L. Schafler and Norman L. Schafler
for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Julie Weng-Gutierrez,
Senior Assistant Attorney General, Richard T. Waldow,
Supervising Deputy Attorney General, and Gregory M. Cribbs,
Deputy Attorney General, for Respondent.

Dr. James Musser appeals from a judgment denying his petition for writ of administrative mandate. Dr. Musser's dental practice was audited by the Department of Health Care Services (Department) and he seeks to set aside the Department's adverse findings resulting from the audit. Dr. Musser contends there is insufficient evidence to support the Department's disallowance of paid claims under the Denti-Cal program. We affirm the judgment.

FACTS

Dr. Musser is a pediatric dentist who has been licensed to practice in California since 1970. Dr. Musser provides services under the Denti-Cal program to very young patients who require general anesthesia for dental procedures.

The Denti-Cal Program

Medicaid is a federal program administered by the states which provides medical assistance to those who cannot otherwise afford it. (42 U.S.C. § 1396a(a).) California's Medicaid program also provides dental services, which is known as Denti-Cal. (Welf. & Inst. Code, § 14000 et seq.)¹ The Department administers Denti-Cal and is responsible for conducting audits of a provider's claims to determine medical necessity and program coverage. (§ 14133, subds. (b)–(c).) A provider may dispute any findings resulting from an audit and request an administrative hearing. (§ 14171; Cal. Code Regs., tit. 22, § 51017.)

At the hearing, the Department has the burden to demonstrate its audit findings by a preponderance of the evidence. Once a prima facie case has been shown, the burden of proof shifts to the provider to demonstrate, by a preponderance of

¹ All further section references are to the Welfare and Institutions Code unless otherwise specified.

the evidence, that his or her position on the disputed issues is correct. (Cal. Code Regs., tit. 22, § 51037.) Section 14171 further provides for judicial review of the administrative decision by petition for writ of administrative mandate under Code of Civil Procedure section 1094.5.

The Audit

In 2012, Delta Dental conducted an audit of Dr. Musser's records for the period between June 4, 2009, and June 4, 2012, on behalf of the Department. Delta Dental concluded Dr. Musser was overpaid during those years by \$57,531.98.² Delta Dental categorized its findings into notes.

Only Note 8 and Note 10 have any relevance to this appeal. In Note 8, the Department disallowed 595 instances of tooth restoration because there were no adequate diagnostic radiographs or X-rays of the area scheduled for treatment. The Department considered the failure to take a pretreatment X-ray to be below the community standard of dental care. In Note 10, the Department identified 704 discrepancies where the pretreatment X-ray or photograph did not show evidence of medical necessity for the procedure under Denti-Cal criteria.

The Administrative Hearing

Dr. Musser disputed the findings in Note 8 and 10.³ A hearing was held before Administrative Law Judge Matthew C.

² This amount was reduced by agreement of the parties to \$56,987.48.

³ Dr. Musser also disputed the disallowances under Notes 1, 3, 4, and 15. Note 1 involved one procedure which was not documented in the patient record; Note 3 involved five units billed which exceeded the number of units payable; Note 4 involved 38 instances in which radiographs were required but not

Felix (ALJ) over three days in April and October of 2014. The parties stipulated that individual case files chosen by the Department would represent the entire population of files at issue. They further agreed to extrapolate the findings from these individual files to the entire population of files audited. The Department chose to present the individual case files of Estafani G. and Sophia R. for its case on Note 10. Estafani and Sophia's patient files were admitted into evidence and Dr. George Gould testified as the expert for the Department on Note 10.

Sophia was three years old when she was referred to Dr. Musser because she was "uncooperative, too little to sit still. Multiple cavities." It was recommended Dr. Musser "do full dental restorations under general anesthesia." Dr. Musser worked on 12 of Sophia's teeth. The Department disallowed pulpotomies⁴ and stainless steel crowns on three of her teeth, labeled A, B, and J. Dr. Gould testified he reviewed the X-rays and did not see decay extending into the pulp of those teeth which would necessitate a pulpotomy. Dr. Gould contrasted the "significant" decay he saw on the X-rays for Sophia's other teeth, labeled K, L, S, and T.

included in the patient chart for the date of service, one instance when the procedure provided did not correspond to the procedure billed, and two instances in which there were no photographs in the patient chart for the date of service; Note 15 involved 95 patient records or charts which were not available for review.

⁴ According to Dr. Musser, a pulpotomy is the removal of decay that has reached or come close to the pulp chamber or nerve of the tooth. After removal of the decay, a stainless steel crown is fitted to support what is left of the tooth.

Estafani was referred to Dr. Musser from another dental clinic with issues involving 14 teeth when she was four years old. The Department disallowed paid claims for stainless steel crowns and pulpotomies performed on two of the teeth, labeled A and J. Dr. Gould testified he reviewed the pre-operative X-rays contained in Estafani's file and did not see decay on teeth A and J. Dr. Gould explained he expected to see a significant sized cavity with "decay penetrating from one direction or another or . . . from the occlusal surface, which is this top biting surface upwards towards the nerve."

On cross-examination, Dr. Gould admitted Dr. Musser had an "advantage" over him because Dr. Musser was able to examine the patients' teeth rather than just review the X-rays. He also conceded the X-rays were not the best quality. The contrast and resolution in the X-rays were not good. When asked whether there could be decay even though the X-ray failed to show any, Dr. Gould conceded that it "can happen, yes." Dr. Gould also conceded that it was possible for some teeth to be fine even though the majority of the patient's teeth exhibited significant decay. Dr. Gould acknowledged he did not have training in pedodontics.

The ALJ issued a proposed decision granting Dr. Musser's dispute of the Department's disallowances under Note 8, but denying the remainder of Dr. Musser's arguments as to the other notes, including Note 10. The Department adopted the ALJ's proposed decision on November 3, 2015. Dr. Musser sought reconsideration of the decision as to Note 10, but the Department denied the petition.

The Petition for Writ of Administrative Mandate

Dr. Musser filed a petition for writ of mandate in the trial court seeking to set aside the Department's decision only with respect to Note 10. He argued the Department's decision was not supported by substantial evidence because the patients were referred for the procedures he performed, X-rays were not required to show medical necessity, and Dr. Musser was in a better position to determine medical necessity. The trial court found substantial evidence supported the Department's decision. The court reasoned Dr. Gould properly relied on the X-rays to determine medical necessity and Dr. Gould's testimony was sufficient to sustain the disallowances in Note 10. Dr. Musser appealed.

DISCUSSION

On appeal, Dr. Musser repeats the arguments he made below. In doing so, he merely reargues the facts. The record, however, demonstrates that substantial evidence supports the administrative findings on Note 10 and Dr. Musser's attacks on the evidence fail.

I. Standard of Review⁵

We evaluate for substantial evidence a petition for writ of administrative mandate challenging Medi-Cal or Denti-Cal administrative decisions. (*Pacific Coast Medical Enterprises v. Department of Benefit Payments* (1983) 140 Cal.App.3d 197, 207; *Bhatt v. State Dept. of Health Services* (2005) 133 Cal.App.4th

⁵ Dr. Musser supplies no standard of review in his briefs. Instead, he asserts the Department has the burden of proof to show lack of medical necessity. We are not concerned with the burden of proof on appeal, merely with our standard of review. (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750.)

923, 928 (*Bhatt*).) “Where, as here, the trial court was called upon to decide whether an agency’s administrative decision was supported by substantial evidence, the function of the appellate court is the same as that of the trial court, that is, to review the administrative decision to determine whether it is supported by substantial evidence.” (*Bhatt, supra*, at p. 928.) “Substantial evidence has been defined as relevant evidence that a reasonable mind might accept as adequate support for a conclusion. [Citation.] A presumption exists that an administrative action was supported by substantial evidence. [Citation.] The burden is on the appellant to show there is no substantial evidence whatsoever to support the findings of the [agency].” (*Taylor Bus Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331, 1340–1341 (*Taylor Bus Service, Inc.*).)

“The substantial evidence test is not a vehicle for this court to superimpose its judgment upon that of the [agency]. Nor does it permit this court to accept ‘any’ evidence or ‘some’ evidence as a basis for the [agency’s] decision. The Supreme Court expressly disapproved such departures from the proper scope of judicial review. [Citation.] Relevant facts which rebut or explain the supportive evidence must be taken into account [citations]. It is the reviewing court’s duty to determine from the whole record whether the contradicting and conflicting evidence so discredits the supportive evidence as to render it insubstantial [citation]. Thus, the need for substantial evidence and the aspect of using the whole record are two sides of the same coin.” (*Mendoza v. Workers’ Comp. Appeals Bd.* (1976) 54 Cal.App.3d 820, 823 (*Mendoza*).)

If, however, pure questions of law were decided by the trial court upon undisputed facts, we apply a de novo standard of review at the appellate level. (*Bhatt, supra*, 133 Cal.App.4th at p. 928.)

II. Substantial Evidence Supports the Department's Determination

In Note 10, the Department disallowed 704 discrepancies where it found the procedures performed by Dr. Musser were not medically necessary. The parties agreed the findings from two individual cases—Estafani G. and Sophia R.—would be extrapolated to the entire population of audited cases.

For both Estafani and Sophia, Dr. Gould testified he did not see decay on the disputed teeth. He explained he expected to, but did not, see a significant sized cavity, such as those apparent in other teeth shown on the X-rays, which would render a pulpotomy and stainless steel crown medically necessary. The X-rays were displayed and the images explained to the ALJ.⁶ Given the X-rays and Dr. Gould's testimony, substantial evidence supports the ALJ's findings on Note 10.

Dr. Musser attempts to discredit Dr. Gould's testimony by characterizing him as a liar⁷ who did not have the advantage of

⁶ Dr. Musser argues the law does not require him to take pretreatment X-rays or photographs of the affected tooth to demonstrate medical necessity for the treatment. This is true for those patients under the age of four or those with developmental disabilities. (§ 14132.88.) However, the Department need not ignore pretreatment X-rays and photographs when they are available in the patient's file.

⁷ Dr. Musser accuses Dr. Gould of lying "with regard to Note 8 and W&I §14132.88" yet provides no citation to the record

examining the patients' teeth himself, who did not have high contrast, good quality X-rays, and who falsely testified that it was possible that an individual with significant decay in many teeth would have a few teeth with no decay. Dr. Musser relies on evidence tending to show the procedures were medically necessary, namely, the referrals from the other dentists, his own examination of the patients, his extensive experience as a pediatric dentist, and his pre- and post-operative diagnoses. In short, Dr. Musser urges us to reweigh the evidence and replace our judgment for the Department's. This, we may not do. (*Mendoza, supra*, 54 Cal.App.3d at p. 823 ["The substantial evidence test is not a vehicle for this court to superimpose its judgment upon that of the Board."].)

In any event, none of the evidence cited by Dr. Musser renders the substantial evidence cited above insubstantial. For example, on cross-examination, Dr. Gould admitted the X-rays were not the best quality and Dr. Musser had an "advantage" over him because Dr. Musser specialized in pediatric dentistry and was able to examine the children's teeth rather than merely view the X-rays. He further admitted Dr. Musser's operative reports identified the need for pulpotomies and stainless steel crowns. These admissions do not negate Dr. Gould's conclusion.

demonstrating any perjury. In any event, there is no indication Dr. Gould provided any testimony about Note 8. Dr. William Hoshiyama testified as the Department's expert regarding Note 8. According to Dr. Musser, Dr. Gould also lied when he testified he saw no decay and then later testified he did not see sufficient decay to justify a pulpotomy. At best, this would be an inconsistency in Dr. Gould's testimony, not perjury.

As to the quality of the X-rays, there is no dispute that the X-rays were of sufficient resolution and quality to show significant decay in the patients' other teeth. Dr. Musser himself asserts that "X-rays when they do demonstrate some decay only show 50-70 [percent] of what is actually present." If so, Dr. Gould should have seen some decay in the disputed teeth; he saw none. Dr. Gould further explained it was possible for a child to have 12 teeth with significant decay, yet have two or three which had no decay. That appears to be what happened here. In short, Dr. Gould disagreed with Dr. Musser's diagnoses that the procedures were medically necessary. The ALJ was permitted to accept Dr. Gould's testimony over Dr. Musser's operative reports and testimony. The ALJ was also permitted to reject the referral slips which only provided a general recommendation for "dental restoration."

As to Dr. Gould's lack of qualifications, there was no indication his lack of board certification or inexperience in pediatric dentistry rendered him incapable of viewing an X-ray and making a diagnosis from it. Likewise, Dr. Gould's inability to examine the patients' teeth did not mean he was unable to provide an opinion of medical necessity from an X-ray. There was no evidence that a physical examination of the tooth is the only way to determine medical necessity for a pulpotomy and stainless steel crown.

Given the entire record, there was sufficient evidence to support a finding that the procedures were not medically necessary. The contradictory or conflicting evidence relied upon by Dr. Musser did not negate Dr. Gould's conclusion. Dr. Musser has failed to meet his burden to show there was no substantial evidence whatsoever to support the Department's findings.

(*Taylor Bus Service Inc.*, *supra*, 195 Cal.App.3d at pp. 1340–1341.)

DISPOSITION

The judgment is affirmed. The Department is awarded costs on appeal.

BIGELOW, P.J.

We concur:

RUBIN, J.

FLIER, J.